

Altorfer Machinery Company, Lift Truck Division and Teamsters Local Union No. 371 affiliated with the International Brotherhood of Teamsters, AFL-CIO. Cases 33-CA-12112, 33-CA-12193, and 33-CA-12373

September 20, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On December 8, 1998, Administrative Law Judge William J. Pannier III issued the attached decision. The General Counsel filed a brief in support of the judge's decision.¹ The Respondent filed exceptions and a supporting brief.² The General Counsel filed an answering brief. The Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Altorfer Machinery Company, Lift

Truck Division, Davenport, Iowa, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER HURTGEN, concurring in part.

I agree with my colleagues, and with the judge, as to all of the violations found, including the finding of bad-faith bargaining. I write separately to establish three different points: one, to note that there are certain factors involved herein which in my view are *not* indicia of bad-faith bargaining; secondly, to emphasize the ultimate conclusion that surface bargaining occurred; and lastly to urge an additional remedial requirement.

Specifically, I find nothing improper in the Respondent's making initial proposals which, if accepted, would have resulted in the employees' receiving lesser benefits than they received before the advent of the Union. It is, of course, common and perfectly lawful for negotiators to employ such tactics. Indeed, the Respondent explained that many of its counterproposals were, in effect, bargaining chips, i.e., the proposed reductions were made with the intention of using their restoration in exchange for concessions by the Union from its own extensive initial proposals. In any event, there is certainly no guarantee that a union contract will be superior to a previous nonunion arrangement, and the proposal of such reductions is not, without more, evidence of bad faith.

Nor do I see anything sinister in the Respondent's use of another tactic often employed by parties to a negotiation, that of agreeing to modify a position without receiving a specific concession in return (so-called "tit-for-tat" bargaining). I would be hard-pressed to find such conduct evidence of bad faith. In my experience, parties often employ this tactic merely to restart negotiations or to avoid getting bogged down.

I would also not find that the Respondent's reluctance to contractually formalize past practices was evidence of bad-faith bargaining. In my experience, it may be simple prudence for an employer to avoid contractually memorializing such practices, many of which are vague and highly conditional. Standing alone, I do not consider an employer's opposition to such clauses, or to open-ended lists of such practices, to be evidence of bad faith.

On a related point, I do not infer bad faith from the judge's finding that the Respondent called the Union's proposed list of past practices "ridiculous." This constitutes mere bargaining rhetoric and posturing. So long as Respondent kept an open mind about reaching an overall agreement, it was free to reject individual union proposals, and even to characterize them harshly.

Finally, I see nothing improper in Respondent's proposal that contractual terms and conditions expire upon the con-

¹ The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We agree with the judge and our concurring colleague that the Respondent's conduct in its entirety reflects an intention on its part either to avoid reaching an agreement or to reach one which would essentially eliminate the Union's representational role. We do not, however, agree with our concurring colleague to the extent that he is suggesting that certain matters are not to be considered in determining whether the Respondent did not bargain in good faith. This reasoning is inconsistent with the principle that good faith or the lack of it depends upon a factual determination based on overall conduct. *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984). Although individual actions standing alone may be insufficient to demonstrate bad-faith bargaining, these actions must be considered a part of the totality of circumstances in determining whether a respondent has engaged in surface bargaining. *Continental Insurance Co.*, 204 NLRB 1013 (1973). See also *NLRB v. General Electric Co.*, 418 F.2d 736, 756-757 (2d Cir. 1969), *cert. denied* 397 U.S. 965 (1970).

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by suspending striker David Wells, we find it unnecessary to pass on the judge's conclusion that even if Wells "had mouthed and gestured obscenities at the van drivers" this conduct does not rise to the level of strike misconduct.

tract's termination. I am aware, of course, that most substantive terms and conditions of employment continue as a matter of law after contract expiration. They normally continue until impasse or a new agreement is reached. However, there is nothing unlawful in an agreement of the parties to have a different arrangement. Accordingly, there is nothing unlawful in the Respondent's proposing such an arrangement.

Notwithstanding the foregoing, I find that Respondent's conduct in its entirety reflects an intention on its part to avoid the reaching of an agreement or to reach one which would essentially eliminate the Union's representative role.

Thus, as the judge noted, the Respondent's counterproposal concerning wage increases and its extremely broad management rights proposal, especially with respect to personnel decisions, would have allowed the Respondent to continue to deal directly with unit employees on an individual basis, to the detriment of the collective-bargaining process contemplated by the Act. Indeed, as acknowledged by the Respondent, apart from granting an employee wage increase, it sought in negotiations to retain its unfettered management control over all aspects of its operations. In the circumstances of this case, I find this position antithetical to the principle of good-faith bargaining. Noteworthy in this respect was the Respondent's proposal that there would be no "just cause" or any other standard for discipline and, indeed, Respondent insisted on complete discretion for all its claimed management rights, including discipline, and that there would be no grievance or arbitration procedure applicable to such actions.

I also note the judge's finding that, apart from its substantive positions, the Respondent made various statements that demonstrated its inflexibility concerning its counterproposals, particularly with respect to seniority, breaks, telephone and restroom use, management rights (especially as to discipline and discharge), and job classifications or descriptions. In my view, the judge correctly found that the Respondent's statements on these subjects did not express a willingness to compromise or settle differences, but rather were "phrases of farewell, should the Union seek to negotiate any changes in Respondent's initial counterproposals concerning those subjects."

In sum, although I agree with the judge's finding that this case is not "open and shut," and I have reservations as to some matters, I adopt the ultimate conclusion that, on balance, a preponderance of the evidence shows that the Respondent did not bargain in good faith.¹

¹ I do not disagree with the principle that all relevant circumstances are to be considered in determining whether an allegation of bad-faith bargaining has been established. However, having said that, I think that the Board is obligated to say what those circumstances are and how they affect that determination. Thus, contrary to the assertion of my

The last point is remedial. This is a first contract negotiation and it is obvious to me that Respondent had decided that there would be no contract or one so woeful that the Union would figuratively cease to exist as a representative of the bargaining unit. The Union was doing everything it could and then some to reach an agreement, but to no avail. Under these circumstances, it may be wholly inadequate to simply order the Respondent to bargain in good faith. The mere order may be insufficient to cause Respondent to genuinely change its mind and view concerning the efficacy of union representation and bargaining. And, without such a conversion, Respondent could resume its similar but more cleverly disguised tactics. However, perhaps a skilled mediator would cause Respondent to alter its *conduct*. It would also provide the Board with a window through which to observe the negotiations and to receive a firsthand neutral report of the bargaining.

Accordingly, I would authorize the Regional Director to appoint a mediator—chosen from a list of those qualified from an American Arbitration Association panel for the Region Office area which includes Davenport. The selection may be of a person mutually selected by the parties or through a procedure of alternatively striking names from the list. The mediator would be directed at Respondent's expense to participate in all bargaining sessions, to attempt to forge an agreement and failing which after a period of time decided by the mediator, to render a report to the parties and to the Regional Director as to the status of the negotiations, including matters agreed upon, matters not agreed upon the positions of the parties with respect thereto, and his or her recommendations concerning the resolution of the nonagreed items.

Judith T. Poltz, Esq., for the General Counsel.

Arthur W. Eggers, Esq. (Califf & Harper, P.C.), of Moline, Illinois, for the Respondent.

John S. Callas, Howard Spoon, Jerry Vermost, and David Bruske, Esqs. (McCarthy, Callas Fuhr & Ellison, P.C.), of Rock Island, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this case in Davenport, Iowa, on January 27 though 30 and on March 4, 10, 11, and 13, 1998. On November 14, 1997,¹ the Regional Director for Region 33 of the National Labor Relations Board (the Board), issued an order further consolidating cases, amended consolidated complaint and notice of hearing, based upon an unfair labor practice charge in Case 33-CA-12112 filed on February 24 and amended on June 12, an unfair labor practice

colleagues, I have not said that these matters "are not to be considered." Rather, as discussed above I *have considered* them and I have found that they do not support the allegation of bad-faith bargaining.

¹ Unless stated otherwise, all dates occurred during 1997.

charge in Case 33-CA-12193, filed on April 4 and amended on June 24, and an unfair labor practice charge in Case 33-CA-12373, filed on September 2 and amended on September 12 and on November 5, alleging violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based upon the entire record,² upon the briefs which were filed, and upon my observation of the demeanor of the witnesses, I make the following findings of fact and conclusions of law.

I. INTRODUCTION

This case presents allegations that an employer unlawfully prohibited employees from discussing a union at their workplace and made unlawful threats against employees caught violating that prohibition, unlawfully discharged one employee and unlawfully issued a written warning to another employee because of purported strike misconduct, and unlawfully conducted negotiations with a newly certified union, in the process unlawfully implementing changes in wage rates of employees represented by that union.

The employer is Altorfer Machinery Company, Lift Truck Division (the Respondent).³ At all material times it has been a corporation, with an office and place of business in Davenport, where it engages in the sale and service of lift trucks. Respondent admits that at all material times it has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, based upon the admitted facts that, in conducting its above-described business operations during calendar year 1996, it derived gross revenues in excess of \$500,000 and, further, during that same calendar year purchased goods valued in excess of \$50,000 which it received at its Davenport facility directly from outside of the State of Iowa.

The Union involved is Teamsters Local Union No. 371, affiliated with the International Brotherhood of Teamsters, AFL-CIO (the Union), a labor organization within the meaning of Section 2(5) of the Act at all material times. On December 2, 1996, it was certified as the exclusive collective-bargaining representative of all employees in an appropriate bargaining unit of all full-time and regular part-time hourly employees employed at Respondent's Lift Truck Division facility located at 3888 West River Drive in Davenport; excluding all other employees, including but not limited to sales employees, confidential employees, guards and supervisors as defined in the Act.

One aspect of events leading to that certification turns out to be significant to the bargaining issues posed here. When the Union filed its representation petition it sought to exclude clerical employees from the bargaining unit. Respondent sought to include them in the unit. In the Stipulation for a Consent Election, the Union eventually agreed to their inclusion.

Negotiations did not commence until January 29. By then, it is alleged, one supervisor already had unlawfully prohibited an employee from "talking union" on Respondent's property and had unlawfully threatened discharge for being caught doing so. That unlawful prohibition, it is further alleged, was repeated on Febru-

ary 6 by that same supervisor and by two others, with accompanying unlawful threats of adverse consequences for employees who did not comply with that prohibition. As discussed in section II, infra, a preponderance of the credible evidence supports those allegations.

The Union submitted its initial proposals by March 20. Respondent submitted its initial counterproposal by April 2. Negotiating sessions were conducted on April 2, 22, and 23; on May 1, 3, 20, 22, and 30; and, on June 5 and 11. That last session led to presentation by Respondent of its final proposal. Nonetheless, another negotiating session was conducted on June 24. The complaint alleges, and the answer admits, that on June 29 Respondent implemented changes in unit employees' wage rates.

On June 16, meanwhile, certain employees had ceased work and engaged in a strike against Respondent. That strike ended when, by letter dated July 6, the Union gave Respondent notice of the strikers' "unconditional return to work at their normal bid start times on Friday, July 11, 1997." Those events would not be particularly remarkable, save for one aspect of the strike.

As discussed in section III, infra, on June 16 there was an incident in which some strikers and two supporters not employed by Respondent followed, in cars, two of Respondent's service vans being driven by employees of Respondent who had chosen not to engage in the strike. On a country gravel road an accident occurred, though no one was injured in it. There were some arrests and criminal convictions. Two of the strikers—engine rebuilders David Wells and Jimmy Sprout—were at the scene of the accident, but neither was arrested nor charged with any criminal violation. Even so, Respondent believed that their conduct that day was sufficient to warrant discipline of both.

On July 18, Sprout was notified that he was discharged and Wells, whose asserted misconduct was viewed as having been less egregious, was suspended for 30 days. The complaint alleges that those disciplinary actions violated Section 8(a)(1) and (3) of the Act. Sprout denied having engaged in any of the misconduct attributed to him. Respondent concedes that its only reasons for having disciplined Wells had been his presence when others engaged in strike misconduct and his failure to take any action to prevent it from continuing.

Although I do not doubt that Respondent genuinely believed those assertions about Sprout and Wells, discipline of the latter for mere presence and for failing to intervene, as a matter of law, does not constitute strike misconduct. In addition, Sprout denied that he had engaged in the misconduct attributed to him. Given the seeming candor of that denial, in conjunction with the unreliability of Respondent's evidence to the contrary, I credit his denial, even though Sprout's testimony was not always credible on other points. Thus, under the analysis spelled out in *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964), Respondent's discipline of Sprout and Wells violated Section 8(a)(1) of the Act. Given that conclusion, in accord with what appears to be settled practice, it is unnecessary to resolve the added issue of whether Respondent, in addition, violated Section 8(a)(3) of the Act, *Eller Media Co.*, 326 NLRB 1287 fn. 2 (1998), and I shall dismiss that allegation.

Negotiations continued during the strike, on July 1 and 7. Another negotiating session was conducted on July 17. By then, the negotiators appear to have run out of patience with each other. Another negotiating session did not occur until October 1. It was

² The record is corrected so that the surname of Alan Vanderheyden is spelled correctly in those places where it is spelled incorrectly.

³ Actually, with the addition of a fourth partner, Respondent's name changed to Altorfer, Incorporated after December 31. However, no motion has been made to amend the caption.

followed by sessions on October 24, on November 26 and on December 23. Over the course of 1997's negotiations, Respondent made some concessions and agreements were reached on some subjects. Even so, as discussed further in section IV, *infra*, I conclude that Respondent's concessions and agreements had been no more than tactical: made in an effort to disguise a rigid overall intention to reach no agreements on any subject that would permit the Union to function in its statutory role as bargaining agent for employees who had elected it to represent them. Such an intention undermines the collective-bargaining process contemplated by Congress and, in turn, undermines the Act's overall objective of fostering collective bargaining as one means for removing or, at least, minimizing obstructions to the free flow of commerce. In consequence, by its bargaining, Respondent violated Section 8(a)(5) and (1) of the Act and its piecemeal implementation of wage increases for unit employees also violated Section 8(a)(5) and (1) of the Act.

II. THE ALLEGED UNLAWFUL ACTS OF INTERFERENCE, RESTRAINT, AND COERCION

The complaint alleges that on January 21 Parts Manager Nancy Olds threatened an employee with discharge for "talking union" on company property. It alleges that Olds did that, as well, on February 6 and, moreover, that on that same date Engine Shop Supervisor Bill Glass and Service Manager David Harvey each had told one other employee that the latter could not discuss union business on company property, coupled with threats of discipline for doing so. Respondent admits that each of those three officials had been a statutory supervisor and agent at those times, but denies that they made any statements which violate the Act.

As will be seen from the recitation of evidence which follows, what occurred is not so susceptible of characterization as a "rule," the term expressed in the complaint, as of "prohibition." Of course, such a difference, in effect, of degree is not fatal to the General Counsel. Resolution of whether or not unfair labor practices occurred is not an exercise in word games. In any event, the facts to which the General Counsel points, in support of those allegations, have been fully litigated. Before turning to those facts, it might be best to state certain principles, to better focus evaluation of the testimony presented by each side.

As discussed most recently in *MDI Commercial Services*, 325 NLRB 53, 63–64 (1997), and in *Koronis Parts, Inc.*, 324 NLRB 675, 694, 695 (1997), the Supreme Court has extended broad protection under the Act to workplace communications among employees regarding unions and union-related subjects, and about employment terms and conditions, such as were involved in *Handicabs, Inc.*, 318 NLRB 890, 890–891 (1995), *enfd.* 95 F.3d 681 (8th Cir. 1996), *cert. denied* 521 U.S. 1118 (1997); in *Indian Hills Care Center*, 321 NLRB 144, 155 (1996), and in *Mobile Oil Exploration & Producing, U.S.*, 325 NLRB 176 (1997).

Without flogging the dead horse of what already has been stated and restated in those cases, the workplace is viewed as a natural place for communications among employees concerning those subjects. In the interest of maintaining production and workplace discipline, however, employers can lawfully impose restrictions on workplace communications among employees. In fact, when justified by production or by disciplinary considerations, employers can prohibit all talking while employees are

working. See, e.g., *Stone & Webster Engineering Corp.*, 220 NLRB 905 (1975), and *Pilot Freight Carriers, Inc.*, 265 NLRB 129, 133 (1982). But, the ability of employees to do so lawfully under the Act is not an unlimited one.

In the first place, such prohibitions and restrictions cannot be discriminatory: cannot prohibit or restrict communication among employees about unions, union-related subjects and employment terms and conditions, while allowing employees to freely communicate with each other about other nonwork-related subjects. Thus, an employer "may not prohibit discussions about a union during worktime while permitting discussions about other nonwork subjects." (Footnote omitted.) *M. J. Mechanical Services*, 324 NLRB 812, 814 (1997). See also *Stein Seal Co. v. NLRB*, 605 F.2d 703, 706–707 (3d Cir. 1979), and *NLRB v. Roney Plaza Apartments*, 597 F.2d 1046, 1048–1050 (5th Cir. 1979). After all, if production and workplace discipline are not viewed as impaired by communications among employees concerning nonwork-related subjects generally, then it is difficult for the employer to view them as somehow endangered by communications regarding unions, union-related subjects, and employment terms and conditions unless, of course, that employer satisfies its burden of showing "special circumstances." See discussion, *Meijer, Inc. v. NLRB*, 130 F.3d 1209, 1214–1217 (6th Cir. 1997).

In the second place, a prohibition on communications among employees may not be overly broad: so broad that it prohibits communications among employees during even paid nonwork periods, such as during breaks and lunch periods, or during unpaid nonwork periods, such as before and after work so long as employees are lawfully on the employer's premises, such as in a company-owned parking lot. Such broad prohibitions are presumptively unlawful "irrespective of whether the [communication] occurs in a work or nonwork area." *St. John's Hospital*, 222 NLRB 1150, 1150 (1976). "Even a rule prohibiting union solicitation in actual working areas at all times has been upheld only in certain settings" (footnote omitted), *Cooper Tire & Rubber Co. v. NLRB*, 957 F.2d 1245, 1250 (5th Cir. 1992), *cert. denied* 506 U.S. 985 (1992), such as hospitals, restaurants, and retail stores. For example, prohibitions of communications during "company time" are regarded as overly broad because that phrase naturally conveys to employees that paid nonwork periods—breaks and lunch periods—are embraced by the prohibition. See, e.g., *Limestone Apparel Corp.*, 255 NLRB 722 fn. 1 (1981), *enfd.* 705 F.2d 799 (6th Cir. 1982); *Florida Steel Corp. v. NLRB*, 529 F.2d 1225, 1230–1231 (5th Cir. 1976).

Any ambiguity in a particular prohibition—one which, for example, "sweep[s] so broadly as to put in doubt an employee's right to engage in union solicitations protected by the Act without fear of punishment by his or her employer," *Albertson's Inc.*, 307 NLRB 787, 788 fn. 6 (1992)—is construed against the employer which formulated that prohibition. For, intent or motive to violate the Act or to prohibit employees from exercising statutory rights is not an element of analysis under Section 8(a)(1) of the Act. "A violation of [Section] 8(a)(1) alone . . . presupposes an act which is unlawful even absent a discriminatory motive." *Textile Workers UAW v. Darlington Mfg. Co.*, 380 U.S. 263, 269 (1965).

In addition, a showing of enforcement of the prohibition, by actual imposition of discipline upon an employee or employees for having violated that prohibition, is not needed to conclude that the

prohibition violated the Act. See discussion, *Medeco Security Locks, Inc. v. NLRB*, 142 F.3d 733, 746–747 (4th Cir. 1998). After all, standing alone, absence of actual enforcement or discipline shows no more than that an unlawful prohibition “achieved its purpose. That is, it succeeded in deterring discussion . . . among . . . employees.” *Koronis Parts*, supra, 324 NLRB at 695.

Turning to the evidence underlying Respondent’s alleged unlawful prohibition, and to the asserted threats aimed at backing up that prohibition, Respondent does not dispute that it has no rule prohibiting communications among employees, not even while employees are working. Service Manager Harvey testified, and engine rebuilder Wells agreed, that whenever employees engaged in lengthy conversations during worktime, something would be said to them by a supervisor, to get them to return to work. Even so, although Harvey testified that Respondent tried to discourage conversations between employees while working, he conceded that there was no rule prohibiting such discussions. In consequence, this is not a situation where, in the interest of production nor that of workplace discipline, an employer has a rule absolutely prohibiting employees from communicating with each other while working or at work.

Beyond that, engine rebuilders Wells and David Wiggins, former parts person Helen Wolever and field service mechanic/technician Alan Venderheyden each denied having ever been told prior to the Union’s election as their bargaining agent, independently of any formal rule, that they could not communicate with coworkers as they were working nor while at work. In fact, Wells testified that, as he had been working and occasionally instead of working, he had engaged in discussions with employees working next to him, about such nonwork-related matters as weekend activities and racing. At “any time” during the day, testified Wiggins, he had engaged in conversations about bowling, television shows, and drag racing, although he agreed that he had not allowed those conversations to interfere with performance of his work. Similarly, Wolever testified that she had conversed with coworkers about animals, spouses, “anything under the sun” as she performed her duties. Of perhaps greater significance, Venderheyden testified not only to having engaged in such nonwork-related discussions while he worked, but he also testified that those discussions had continued even when supervisors “walked through the shop” and, significantly, that one or more times a week on average, supervisors and managers would participate in those conversations.

Parts person Wolever, a member of the Union’s negotiating committee who worked for Respondent until mid-September, and Parts Manager Olds, Wolever’s immediate supervisor, agreed that there had been a conversation between them on January 21 about communications while at work regarding the Union. Wolever testified that she had been summoned to Olds’s office where Olds “said that rumor has it that you’ve been talking union on company time.” After she denied having done that, testified Wolever, Olds warned that “she could be forced to let [me] go if management caught me talking union on company time, company property.” According to Wolever, Olds added, “that she would hate to lose me over such a piddly reason,” and “reminded me, again, that she thought that the company did not allow their employees to talk union on company time, company property, or on their breaks.”

As mentioned at the beginning of the preceding paragraph, Olds agreed that such a conversation had occurred. She testified, however, that it had been initiated, during a discussion then already in progress in her office, by Wolever. According to Olds, Wolever had volunteered that she (Wolever) would be one of the negotiators for the Union. During direct examination, Olds testified that their ensuing conversation had involved “not talking about union business . . . to where it was taking away from work productivity.” When she described specifically what she had said to Wolever, however, Olds testified that she had “requested that [Wolever] not discussion [sic] union business and that we try to carry on as normal during the work day,” after which Wolever had agreed, saying that Union people had told her not to talk “about union business at work.”

Pressed during cross-examination about that conversation with Wolever, Olds claimed that her memory about it was not completely clear. Then, “as best my memory can recall,” she first testified that she had instructed Wolever not to discuss union business “on company time while she was working,” but then testified, “I think what I told her was that she shouldn’t be talking about company—about union business on company time.” Significantly, Olds never denied having warned that “she could be forced to let [Wolever] go if management caught [Wolever] talking about union on company time [or] company property,” nor did Olds deny having said, “[T]hat she would hate to lose [Wolever] over such a piddly reason.” Moreover, Olds did not deny having ended their conversation by telling Wolever “the company did not allow their employees to talk union on company time, company property, or on their breaks.”

The fact that testimony is not denied, of course, does not mean that it *must* be credited. See *Kasper v. Saint Mary of Nazareth Hospital*, 135 F.3d 1170, 1173 (7th Cir. 1998), and *MDI Commercial Services*, supra, 325 NLRB at 58. Nonetheless, a witness’s failure to deny unlawful remarks attributed to that witness is some indication that that witness does not dispute having uttered those remarks. When testifying, Wolever seemed to be doing so candidly. In light of other remarks which, as quoted above, Olds admitted having made during her January 21 conversation with Wolever, it is objectively probable that she also had made the uncontested remarks attributed to her. Therefore, I credit her account that Olds had threatened that she (Wolever) could be “let go” if caught “talking union on company time, company property,” because Respondent did not “allow [its] employees to talk union on company time, company property, or on their breaks.” Under the principles discussed above, such a prohibition is both discriminatory, given the absence of any rule prohibiting workplace communications among employees regarding nonwork-related subjects, and overly broad, thereby naturally interfering with, restraining and coercing Wolever, a statutory employee, in the exercise of a right protected by Section 7 of the Act.

That conclusion is not diminished by the fact that the discriminatory and overly broad prohibition corresponded with the Union’s own instruction to Respondent’s employees. Such a cautionary instruction, of which there is no evidence that Olds had knowledge prior to her January 21 conversation with Wolever, appears to have been no more than a prudent effort to protect the Union’s employee-activists from retaliatory and intimidating action by Respondent, such as that to which Olds subjected Wolever

on January 21. The Union's instruction to employees certainly cannot be held to somehow rise to the level of some sort of waiver of employees' statutory right to communicate at their workplace about the Union and union-related subjects, and about employment terms and conditions. In any event, there is neither contention nor evidence that, on January 21, Olds had been relying upon anything said to employees by the Union when she instructed Wolever not to "talk union" on company time or property.

Beyond that, whether or not Wolever had initiated discussion of the Union, by revealing her newly-acquired role as one of the Union's negotiators, is not a material analytical factor. Employee-initiation of conversations about unions does not provide a justification under the Act for ensuing unlawful statements which supervisors choose to make, as such conversations progress. See, e.g., *NLRB v. General Electric Co.*, 418 F.2d 736, 755 (2d Cir. 1969), cert. denied 397 U.S. 965 (1970); *NLRB v. Randall F. Kane, Inc.*, 581 F.2d 215, 218 (9th Cir. 1978). When a supervisor chooses to inject unlawful prohibitions and threats into employee-initiated conversations, those injected unlawful statements are no less unlawful because it had not been the supervisor who initiated discussion of a union or unions. *Rock-Tenn Co.*, 238 NLRB 403, (1978).

In sum, credible evidence establishes that Parts Manager Olds, an admitted statutory supervisor and agent of Respondent, threatened that Wolever, a statutory employee, could be fired for discussing the Union on company time or company property, including during breaks. As concluded above, the prohibition was both discriminatory, given the absence of any general prohibition of workplace discussions among employees about nonwork-related subjects and the evidence that such discussions had been allowed prior to the Union's certification, and overly broad. A threat to discharge employees caught violating such an unlawful prohibition naturally interferes further with employees' statutory right to communicate at the workplace about unions and union-related subjects. Therefore, I conclude that Respondent violated Section 8(a)(1) of the Act on January 21 by prohibiting an employee from communicating with coworkers about the Union at all times on Respondent's property and, further, by threatening that employee with discharge if caught doing so.

Turning next to the analytically related issue of alleged unlawful prohibition and enforcing threats on February 6, it is undisputed that, sometime between noon and 12:30 p.m. that day, Wolever was at her station on the parts side of the main warehouse parts department counter. On the other side of that counter were engine rebuilder Wiggins and field service mechanic/technician Alan Vanderheyden. To understand what underlies the events which ensued, it is necessary to be aware of five background facts.

First, parts are not all stored at a single location at Respondent's Davenport facility. Most are kept in the parts department located in the main warehouse, where Wolever worked. But, most of the parts needed for engine rebuilding are stored in the parts department of a building, other than the main warehouse, in which engine rebuilding is conducted.

Second, ordinarily an engine rebuilder, such as Wiggins, would obtain all his parts from the parts department in the building where engine rebuilding is located. However, when building a Perkins

engine—be it a 203, 236, or 248—some of the parts are stored in, and must be obtained from, the main warehouse parts department.

Third, whenever an engine rebuilder needs parts, he/she completes a "req"—requisition—listing the quantities of needed parts by number and description, as well as listing the work order number, date and the requesting engine rebuilder's name. According to Parts Manager Olds, that requisition would be submitted to personnel—as of February, Rita Malloy and, perhaps still, Paul "Duke" Lawler—in the engine rebuilding parts department. If it then was determined that one or more of those parts was/were stored in the main warehouse, Engine Shop Supervisor Bill Glass would bring the req to the main warehouse parts department. But, Olds acknowledged, that was not always the procedure followed.

If the engine rebuilding building's parts department personnel were not at their station, such as presumably during lunch, Olds testified, "[T]hen the req should have been brought over" to the main warehouse parts department by the engine rebuilder. As a result, although she testified that "it is unusual for engine shop technicians to be at the [main warehouse] parts counter," Olds conceded that, prior to February 6, she had seen Wiggins there, albeit "rarely," whenever he had been seeking parts for a Perkins engine. In addition, Olds admitted that there was nothing improper about either Wiggins or Vanderheyden being at the counter of the main warehouse parts department.

Fourth, whenever Wiggins came to that part department, Olds testified at one point, he needed only to "drop[] off the requisition, come back to the engine shop, and wait[] for someone to bring him his parts." Nevertheless, it seems undisputed that only a few parts for a Perkins engine are stored at the main warehouse. Olds admitted that, ordinarily, "if it was like a single part, he might wait for it," rather than simply leave the req and return to the engine rebuilding building. In fact, her admissions reveal that waiting in the main warehouse for a part or two was not a discretionary issue for the engine rebuilder and, instead, was an obligation imposed by Respondent: "If there was a couple of parts that he knew were over in the main warehouse, he might wait for them *and should wait for them and just take them back with him.*" (Emphasis added.)

Finally, regardless of whether engine rebuilders would be taking parts back from the main warehouse, or would be returning to the engine rebuilding building to await their delivery, the testimony of Olds discloses that more is involved than simply taking a req to the main warehouse parts counter and dropping it off. For, Olds acknowledged that whoever at the parts counter receives the req must punch the parts listed onto the computer to ascertain which ones are being stored in the main warehouse and which others are being stored in the engine rebuilding building:

Q. And its possible that, if he had a requisition form, some of those parts might have been in the engine shop and some of them might have been elsewhere?

A. Right.

Q. But he would need Helen [Wolever] to punch this into the computer to tell him where the parts were?

A. Right.

Now, that computer-function appears to require more than a minute to perform.

Olds did not dispute Wolever's description of what needs to be done to locate parts by means of the computer. According to Wolever, from the req parts list she would enter each part on the computer, after which "I take the print-out off the printer and then there's also pick tags and then I go walk down to the pick tag printer and I pull the pick tags off. They have like the part number and the location and the quantity and I look through the list and see if there's any part with a location that would have been on our side." (Emphasis added.) Then, steps have to be taken, and some time consumed doing so, picking the parts which are being stored in the main warehouse parts department and, as pointed out above, which the engine rebuilder must take back to the engine rebuilding building. In consequence, seemingly the larger the list of parts on a particular req, the longer the time needed to go through that process.

All of which leads back to the events of February 6. Wiggins testified that he had prepared a req for Perkins engine parts and had taken it to the main warehouse parts counter for location of those parts and, also, to pick up whichever one were being stored in the main warehouse. When he arrived at the parts counter, already there filling out a req was Vanderheyden. So, Wiggins testified that he "[j]ust waited 'til Helen was done with Al." Interestingly, Olds never contested Wiggins's testimony that she also had been present in the main warehouse parts department when he had arrived there, "writing on the chalk board for the delivery driver." Obviously, she had not seen fit to take the time to assist Wolever, already occupied with Vanderheyden, by assisting Wiggins.

Wiggins and Wolever testified that the latter had taken the former's req, which both Olds and Wolever testified had been a page-and-a-half in length, and had punched the 25 to 30 listed items into the computer, after which she had located to 10 to 15 percent of those parts, according to Olds's estimate, then-stored in the main warehouse and gave them to Wiggins who returned to the engine rebuilding building. So far as the evidence discloses, given the procedure described in preceding paragraphs, it cannot be said, as an objective matter, that Wiggins had spent an inordinate amount of time at the main warehouse parts counter on February 6. Although there may have been some exchange of words between them during that encounter, Wolever and Wiggins each denied having discussed the Union on February 6 at the parts counter. So, too, did Vanderheyden. However, Olds suspected differently.

Wolever estimated that she spent approximately 15 minutes with Wiggins at the parts counter on February 6. Wiggins estimated that it had been only 5 minutes. From her office, Olds testified that she had observed Wiggins and Vanderheyden talking to Wolever for "a few minutes." She testified that she knew all three were on the Union's negotiating committee.⁴ And she

"questioned if—if everything out there that was going on was a business purpose and not just people standing around not doing their work." Admittedly, she did not simply go out and ascertain from the three employees—one of whom, Wolever, Olds directly supervised—what they were doing.

Instead, Olds went to Service Manager Harvey and reported, she testified, that three "Union negotiators," two of whom he supervised, were talking together in the parts department. Harvey agreed that Olds had reported that three people on the Union's negotiating committee possibly were engaging in discussion at the parts counter. He further testified that when he went out to that area, Wiggins and Vanderheyden were already gone. Apparently, Harvey did not see fit to say anything to Wolever about any possible conversation at the parts counter. This sequence of events led to at least two and at most four conversations between supervisors and employees. Those conversations form the basis for the allegedly unlawful statements of February 6.

With regard to one of those conversations, counsel, perhaps becoming imbued with "the feel of the fighting," *Winn & Lovett Grocery Co. v. NLRB*, 213 F.2d 785, 786 (5th Cir. 1954), reversed their natural positions, with Respondent presenting testimony which admitted unlawful statements and with the General Counsel presenting testimony which contradicted it. Thus, called as a witness for Respondent, Harvey testified that, following Olds's report, he had waited for Vanderheyden to return from a customer call. When Vanderheyden did so, Harvey testified that he asked, "[W]hat they were or what you were talking about and he said, well, we were talking about the [U]nion." Then, testified Harvey, "I asked him if he remembered that, while they were on the clock, that they should keep to business and not discuss any union activities and he said, well, yeah, he knows that now and it'd never happen again." By way of explanation about the concern which had led him to question and admonish Vanderheyden, Harvey testified, "We don't allow meetings during work hours," though he also allowed, "I don't know if you call [the three employees' conversation] a meeting."

Of course, under the conclusion reached above and the principles set forth at the beginning of this section, by his own description of having admonished Vanderheyden not to "discuss any union activities" so long as "on the clock," Harvey effectively admitted having uttered a prohibition unlawful under the Act. In fact, it should not escape notice that Harvey had done so without any accompanying effort to ascertain if Vanderheyden's conversation with Wolever and Wiggins had interfered with performance of Vanderheyden's work. Indeed, Harvey made no reference whatsoever to the issue of possible work interference which, as pointed out above, there is no evidence occurred as a result of Vanderheyden, Wiggins and Wolever's encounter earlier on February 6.

⁴ Vanderheyden was not, in fact, on the negotiating committee. Then-Business Agent Bruske testified that, instead, Vanderheyden had been on a subcommittee, though Bruske acknowledged that "Vanderheyden I believe did sit in on one session in March sometime." Still, Bruske admitted that Respondent had known by February that Vanderheyden, and others, were members of that subcommittee. Moreover, for all the Sturm and Drang over assertions by Respondent and its witnesses about Vanderheyden having been on the negotiating committee, the fact is that Vanderheyden, himself, was confused about his own

status in connection with the negotiations. In response to the General Counsel's own questioning, Vanderheyden testified that he had been on the Union's negotiating committee "from probably December through the time that I left the Company," during March. At best, Respondent's testimony shows no more than that its officials, like Vanderheyden, were confused about his role in negotiations and mistakenly regarded him as one of the Union's employee-negotiators. That confusion is hardly the "stuff" of untruthfulness.

Apparent concern about Harvey's assertion that Vanderheyden having admitted that he had discussed the Union with Wiggins and Wolever led to the calling of Vanderheyden as a rebuttal witness. He did deny having said to Harvey that he had discussed the Union with those two employees at the parts counter. But, he also denied altogether having "had a discussion with" Harvey about the subject of having discussed the Union in the main warehouse parts department. If true, of course, that denial refutes Harvey's, in effect, admission of having unlawfully stated that Vanderheyden, and other employees, should "not discuss any union activities" while "on the clock."

Nonetheless, Vanderheyden's denial about having been spoken to by Harvey, regarding possible parts counter discussion about the Union, tends to be refuted by the accounts of Wiggins and Wolever concerning what happened to them that same afternoon. As described below, each testified—Wiggins, without contradiction—to having been spoken to, regarding that parts counter conversation, by a supervisor. If so, obviously it is most likely that, as well, Vanderheyden had been the object of a similar discussion, as Harvey testified had been the fact. It is not truly significant whether or not, during that conversation, Vanderheyden actually had admitted to Harvey that a discussion had occurred among the employees concerning the Union or, alternatively, whether Respondent's supervisors later tried to bluff Wiggins and Wolever into admitting as much, by telling them that Vanderheyden had made such an admission. Under the complaint's allegations, the crucial issue is whether Respondent unlawfully prohibited employees from discussing the Union at the workplace. As much was admitted by Harvey when he described his conversation with Vanderheyden during the afternoon of February 6.

Uncontradicted was the testimony by Wiggins that he had been summoned to the office of Engine Shop Supervisor Glass, during the afternoon of February 6, where, "Bill Glass said to me you have been warned about discussing union business on company property." When he asked what Glass was talking about, testified Wiggins, Glass retorted, "I'm just relaying a message that Dave Harvey said that you're not to be discussing union business on company property." Wiggins replied, "I'll go over and take this up with Dave Harvey then." Glass was never called as a witness, though there was neither evidence nor representation that he was unavailable to testify. As pointed out above, the fact that testimony is not contradicted does not mean that it *must* be credited. Yet, Wiggins appeared to be an honest individual who was trying to recreate events with candor. His uncontested account of the remarks by Glass are consistent with Harvey's admitted remarks to Vanderheyden and, also, with the remarks that afternoon which Wolever attributed to Olds, as discussed below. Accordingly, I credit Wiggins's testimony about what had been said to him by Glass.

Aside from the prohibition on "discussing union business on company property," one other aspect of Glass's remarks to Wiggins warrants a second look. Harvey and Olds each admitted that the former had reported back to the latter that Vanderheyden had admitted that the three employees had been discussing the Union at the parts counter. "He told me that Val had—Al [Vanderheyden] had admitted to him that they had been talking about union business and that he had said they wouldn't be doing it again and he [Vanderheyden] apologized for it," Olds testified. But, Harvey

denied that he had taken, or had sought to have other supervisors take, any further action concerning Vanderheyden's admission that he had been discussing the Union with Wolever and Wiggins at the parts counter. Yet, although Olds denied that she had taken any further action as a result of Harvey's report back to her about what Vanderheyden had admitted, the nonappearance of Glass as a witness leaves uncorroborated Harvey's denial that he had directed Glass to pursue further action regarding those three employees' discussion at the parts counter.

It is uncontradicted that, as quoted above, Glass had said to Wiggins, "I'm just relaying a message that Dave Harvey said." In other words, Glass admitted to Wiggins that, in fact, he (Glass) had been told by Harvey to pursue further action in connection with the employees' earlier encounter at the parts counter. That remark by Glass is not susceptible to hearsay objection, since under Federal Rules of Evidence 801(d)(2)(D) it constitutes an admission by Glass of what another agent of Respondent, Harvey, had instructed Glass to do. In any event, no hearsay objection was raised to that description by Wiggins as to what Harvey had instructed Glass to do. And that remark is significant. It contradicts Harvey's denial of having directed Glass to pursue further action as a consequence of Vanderheyden's admission that the Union had been discussed at the parts counter. In turn, it casts doubt upon the reliability of Harvey's testimony. After all, falsification in one area shows a capability to falsify in others and, as a result, that demonstrated falsification "should be considered negatively in weighing [the witness's] other statements." *McCormick on Evidence* §45 at 169 (ed. 1992.)

Consistent with his above-quoted testimony about what he had said to Glass, Wiggins testified that he had braced Harvey, that same afternoon, about what had been said by Glass. Wiggins testified that he asked why Harvey was making such an accusation. In response, according to Wiggins, Harvey's "exact words were we will not tolerate discussing union business on company property," which Wiggins then denied having done: "we've never been told that we could discuss it . . . while we're on the premises, so it doesn't happen." Wiggins testified that Harvey asserted that one of the other two employees had admitted "talking union" at the parts counter. But when Wiggins pursued the subject, he further testified, Harvey backed down somewhat, saying, "[Y]ou and Al and Helen were in the Parts Department and I assumed that you were discussing union business." Of course, that statement tends to support the above-mentioned possibility that Respondent's supervisors had tried to bluff Wiggins and Wolever, as described below, into admitting that which Vanderheyden may not have actually admitted during his exchange that afternoon with Harvey.

When he was interrogated during direct examination about that conversation described by Wiggins, Harvey initially denied flatly that it had occurred. Before direct examination was completed, however, he conceded that it was possible that he had participated in a conversation with Wiggins, but simply did not recall it: "Well, certainly, it's entirely possible." Consequently, at that point the best that Harvey's testimony showed is that he did not recall whether or not he had made the above-quoted remarks to Wiggins. Of course, a lack of recollection "hardly qualifies as a refutation of . . . positive testimony and unquestionably [is] not enough to create an issue of fact between" Wiggins and Harvey.

Roadway Express, Inc. v. NLRB, 647 F.2d 415, 425 (4th Cir. 1981).

Harvey's conceded lack of recollection was pursued during cross-examination, however. At that point he denied flatly having participated in the above-described conversation with Wiggins: "No. I did not talk to Dave Wiggins about it." Thus, the record is left with a direct contradiction of the account advanced by Wiggins. Nevertheless, it was my impression that Harvey was not always being candid when he testified: that he was tailoring his testimony to fortify Respondent's position, instead of trying truthfully to recreate events and conversations as they had occurred. Certainly, he had a particular reason to do so in connection with the conversation described by Wiggins. As pointed out above, Harvey denied that he had directed Glass to take any further action concerning the employee-encounter at the main warehouse parts counter. That denial would tend to be diminished, at least somewhat, by any concession that he had been approached by Wiggins concerning action by Glass that, in fact, demonstrated that Glass was taking further action regarding what may have occurred at the parts counter.

As pointed out above, I felt that Wiggins was testifying with candor. There is no evidence as to why Glass would even have logically known about the parts counter encounter of Wolever, Wiggins and Vanderheyden had Harvey not spoken to Glass about it. Under Respondent's scenario, it would not have been illogical for Harvey to have reported back to Olds what Vanderheyden may have said. She had been the supervisor who had reported to Harvey what she had seen at the parts counter. But, there is no seeming logic for Harvey to have said anything to Glass, if Harvey truly had not intended for the other two supervisors to take some action to prevent future communication among employees about the Union. Yet, Glass told Wiggins that Harvey had done so. Even without that express admission, there is no basis for inferring logically, based upon Respondent's scenario, that Glass would have said anything to Wiggins nor, even, that Glass likely would have known about what may have occurred at the parts counter, unless Harvey had gone out of his seeming way to relate to Glass what had occurred. But, had Harvey not intended Glass to take some action, left unanswered is why Harvey would have said anything at all to Glass about events at the parts counter.

That, contrary to his denial, Harvey had wanted his supervisors to pursue the subject is shown further by Wolever's testimony about what was said to her that same afternoon by Olds. Wolever testified that she had been summoned to the office where "first [Olds] reminded me about our conversation on January 21st" and, then, "accused me of talking union, to Dave Wiggins and Al [Vanderheyden] in the parts department." After explaining that she only had been "running a requisition for Dave Wiggins" and denying having discussed the Union, Wolever testified that she was told by Olds "that one of us had admitted to talking union out there," adding that Harvey had said that Vanderheyden had admitted as much. According to Wolever, the conversation concluded with Olds telling "me that I wasn't going to get fired over this and she didn't know whether I'd get written up and I said, well, I'd better not get written up because it didn't happen."

Olds agreed that such a conversation had taken place. But, as with her testimony about the conversation with Wolever on January 21, Olds denied having initiated it. Rather, she claimed that

Wolever "came to me" and "said that she was very upset and Dave Wiggins was very upset that they had been accused of discussing union matter during company time," to which Olds replied "one of the three of you has already admitted" as much. According to Olds, Wolever denied having done so and was reminded by Olds of their January 21 conversation concerning "talking about union business . . . to where it was taking away from work productivity," though Olds ultimately conceded that she "probably said," during the February 6 conversation, that Wolever could not discuss union business at work. Of course, that concession pretty much establishes utterance of an unlawful prohibition by Olds on February 6, under the principles identified above.

Two general points are disclosed by review of the entirety of the above-described testimony concerning what occurred on February 6. First, there is no evidence that Wolever, Wiggins and Vanderheyden had been discussing the Union, and its negotiations with Respondent, while at the main warehouse parts counter. As pointed out above, the time spent there by Wiggins—and, for that matter, Vanderheyden—hardly seemed inordinate given the undisputed evidence of procedure needed for Wolever to process parts lists and locate the few Perkins engine parts being stored in the main warehouse and which engine rebuilders were obliged to take back to their building. More importantly, there is no evidence whatsoever that whatever conversation may have occurred at the parts counter, among those three employees or any two of them, had detracted from their work—had been other than the types of exchanges, whether work-related or nonwork-related, in which Respondent's employees normally had engaged before the Union had been elected to represent them.

Second, there really is no evidence whatsoever that Respondent's supervisors had been concerned in the least with any possible neglect of duties by Wolever, Wiggins or Vanderheyden on February 6. So far as even the testimony of Olds and Harvey discloses, nonperformance of work, while two or all three of those employees conversed, was never an object of inquiry or investigation. Instead, Harvey, Glass and Olds pretty much confined their questioning, prohibitions and threats of possible adverse action to the possibility of employee-communications involving only the Union, with possible work interference being relegated to no more than, in essence, a footnote to what was said to Vanderheyden, Wiggins and Wolever. In the totality of the circumstances, there is no basis for concluding that, on February 6, Respondent's officials had actually been concerned with work performance nor with workplace discipline.

Olds admitted that it had been the possibility that the three employees might be discussing the Union which had led her to report that perceived possible activity to Harvey. Harvey admitted that that limited report, in turn, had led him to question Vanderheyden and, more importantly, given the complaint's allegations, to say that "while . . . on the clock" employees could not "discuss any union activities." Similarly, it is undisputed that Glass told Wiggins that "you're not to be discussing union business on company property." And I credit the testimony that Harvey later repeated that same message to Wiggins: "[W]e will not tolerate discussing union business on company property." In addition, Olds admitted that she had "probably said" that Wolever could not discuss union business while at work. I credit Wolever's testimony that she was reminded by Olds about their January 21 conversation—during

which Olds had unlawfully prohibited Wolever from “talking union” on company time or property, and had threatened that discharge could ensue if Wolever were to be caught doing so—and was threatened with a possible written warning based upon Respondent’s suspicion that she and the other two employees had been discussing the Union at the parts counter.

Under the principles set forth at the beginning and throughout this section, those February 6 remarks by admitted statutory supervisors to Vanderheyden, Wiggins, and Wolever naturally interfered with, restrained, and coerced those employees in the exercise of their statutory right to communicate about the Union and union-related subjects at their workplace. Respondent has presented no valid defense to its discriminatory and overly broad prohibition and to the threats utilized to put teeth in those repeated prohibitions. Therefore, I conclude that a preponderance of the credible evidence shows that Respondent further violated Section 8(a)(1) of the Act on February 6, by prohibiting employees from discussing the Union and union-related subjects on company time and property and, also, by threatening discipline should employees be caught doing so.

III. THE DISCIPLINE OF SRIKERS DAVID WELLS AND JIMMY SPROUT

As mentioned in section I, above, the amended consolidated complaint alleges that Respondent violated Section 8(a)(1) of the Act by having discharged one and suspended another striker for having engaged in asserted strike misconduct. At the outset, certain established principles should be brought into focus, to better inform review of the evidence underlying those allegations.

“The law is clear that when an employer disciplines an employee because he has engaged in an economic strike, such discipline violates Section 8(a)(3) and (1) of the Act.” *General Telephone Co. of Michigan*, 251 NLRB 737, 738 (1980). No different result exists with respect to unfair labor practice strikers. Those conclusions find their root in the intent of Congress expressed in Section 13 of the Act: “Nothing in this Act [subchapter] except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right.” Note that while that section of the Act protects the right of employee to strike, it preserves “the limitations or qualifications” already imposed upon it.

One long-recognized such “limitation[] or qualification[]” on the right to strike is susceptibility to discipline for strike activity which constitutes misconduct. “To justify [strike misconduct] because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundation of society.” *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 253 (1939). Even so, as the Court later cautioned, assertions of strike misconduct should be evaluated with care lest “protected activity would lose some of its immunity, since the example of employees who are discharged on false charges would or might have a deterrent affect on other employees,” leaving statutorily protected activity to “acquire[] a precarious status” because “innocent employees [are] discharged while engaging in it, even though the employer acts in good faith.” *NLRB v. Burnup & Sims*, supra, 379 U.S. at 23.

In that case, striking a balance between the policies of protecting employees engaged in statutorily-protected activities and of allowing employers to discipline employees who engage in misconduct while doing so, the Court established a four-step analytical methodology. Thus, Section 8(a)(1) of the Act “is violated if it is shown that the [disciplined] employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the [discipline] was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct.” *Id.* As quoted above, the Court held specifically that if the answer in all four areas is an affirmative one, then it is not a defense to a conclusion of violation that “the employer [has] act[ed] in good faith.”

That methodology has been applied by the Board specifically to assertions of strike misconduct. See, e.g., *Beaird Industries*, 311 NLRB 768, 769 fn. 7 (1983). So, also, have the United States Courts of Appeals. See, e.g., *Allied Industrial Workers Local 289 v. NLRB*, 476 F.2d 868, 878–880 (D.C. Cir. 1973); *Kayser-Roth Hosiery Co. v. NLRB*, 447 F.2d 396, 400 (6th Cir. 1971).

With those principles in mind, attention can now be directed to the events of June 16, the first day of the strike and the day on which the asserted strike misconduct took place. During that day’s morning two service vans, one driven by nonstriking service mechanic/technician Tom Post and the other by nonstriking service mechanic/technician Gary Chisholm, left Respondent’s facility. Following them, with an intention of picketing at whatever customer-locations those nonstriking employees stopped to perform work, were two cars. One—a Ford Escort—was driven by striking employee Bill Lynch; riding as a passenger was Dalen Snow, also a striking employee of Respondent. The other car—a Chevrolet Lumina—was driven by Tiny Bailey, a strike sympathizer not employed by Respondent. Riding in the Lumina’s front passenger seat was another nonemployee strike-sympathizer, identified in the record only as Ken. Also riding as a passenger, in the Lumina’s back seat, was striking employee David Wells.

A fifth vehicle also left Respondent’s facility when the above-mentioned service vans and cars left it. That was a green 1996 Chevrolet S-10 pickup truck, driven by striking employee Jimmy Sprout. He testified that, while he had left the facility at the same time as the other vehicles, he had been going to a particular customer-location, different from where the service vans may have been headed, to engage in picketing there, should one of Respondent’s service vans and its nonstriking driver show up. That testimony by Sprout was contradicted, however, by then-Business Agent Bruske.

Bruske testified that he had been assigning strikers and their supporters to go to specific customer locations to picket should any of Respondent’s service vans show up at one or more of them. However, testified Bruske, Sprout “got there somewhat late and I told him, because he got there late[,] to follow the others and when they got to where they were going they would give him a list and tell him where to go and explain to him what was going on.” Consequently, Sprout’s departure from Respondent’s facility was related to the service vans and cars which preceded his truck and he was intending to follow those four vehicles.

There is some dispute about the exact order of the service vans and cars after they left Respondent’s facility. There is no dispute about the fact that Sprout was the last of the five vehicles. All five

entered a side street and turned onto State 61, along which they traveled until reaching Interstate 280, onto which they turned. For 5 or 6 miles they traveled along Interstate 280. There is contradictory testimony concerning whether the cars or, at least, one or another of them had been tailgating one or the other service van for periods and, at other periods, had passed service vans, pulled in front of one or the other of them, and repeatedly applied the brakes and then sped up after the following service van was forced to slow down.

The vans followed by the cars and, eventually, by Sprout turned off Interstate 280 at the Kimberly Road offramp. After traveling along Kimberly Road for a short distance, the vans and cars turned onto a gravel road. They traveled along it, eventually reaching a point where it became a paved road. After traveling awhile on that paved segment, the vans and cars turned onto another gravel road, denominated 145th Street. Sprout testified that, after turning onto State 61 the vans and cars had sped up and, being unwilling to also do so, he had lost direct contact with them. Not until he neared the Kimberly Road offramp on Interstate 280, testified Sprout, did he again see the four vehicles. By that time, they were on the first gravel road and were observed there by Sprout from the interstate.

In fact, no witness disputed Sprout's testimony about having no longer been in the procession of vehicles as it traveled along Interstate 280, although Respondent would later attribute misconduct to Sprout during that portion of the vehicles' journey that morning.

Sprout testified that, upon observing the four other vehicles on the first gravel road, he had turned off Interstate 280 at the Kimberly Road offramp and had hastened to catch up with them. As to his reason for having done so, given his contradicted testimony about going to a customer-location other than the likely destinations of the two service vans, Sprout testified that he had observed, from the interstate, that the vans and cars were "driving recklessly" on the first gravel road. In fact, Post and Chisholm each testified that the drivers of the Lumina and Escort had continued tailgating and, also, that the Lumina had passed the lead service van and, then, had repeated the actions of slowing down and then speeding up when the vans slowed to avoid a collision. With respect to his reason for leaving the Interstate, Sprout explained, "I thought, maybe, an accident might happen and, if somebody needed help, then I was there to help." Sprout's testimony tends to remove any doubt that the drivers of the Lumina and Escort had engaged in at least some unsafe driving that morning.

After turning onto 145th Street, the second gravel road, Chisholm ended up stopped at the side of the road. He testified that he had been forced to do so, because the Lumina had passed him and then had stopped in front of his van, forcing Chisholm to likewise stop. Wells testified, however, that Chisholm's vehicle had been the lead vehicle making the turn onto 145th Street and, after having made that turn, that Chisholm had stopped at the side of the road. According to Wells, the other three vehicles had passed the stopped van, but Bailey had slowed down in front of Chisholm's by-then stopped van, to ascertain what Chisholm next intended to do, bearing in mind that the Union wanted each of the vans to be followed to its customer destination.

Meanwhile, Post, followed by Lynch's Escort, continued for a piece along 145th Street until Post decided to turn around and return to Chisholm's location. For, both Chisholm and Post testified, by then all three Lumina occupants—Bailey, Ken, and Wells—had gotten out of their assertedly stopped car and Bailey was pounding on the Chisholm's stopped van and was reviling Chisholm for not joining the strike.

Post turned around in a driveway. But, he testified that he had encountered difficulty doing so because Lynch kept trying to block him from turning around. Once he succeeded in getting turned around, testified Post, he began driving back toward Chisholm and the Lumina, but the Escort, also by then turned around, moved up on his (Post's) van's right side and began trying to force it across the road and into the ditch on the other side. Regardless of whether that is or is not an accurate description of what had occurred, there is no dispute about the fact that, as Post headed back, his van was on the wrong side of the road, aimed directly at Bailey's Lumina.

Chisholm and Post each testified that Bailey had run back to the Lumina, had jumped in and had begun driving in the direction of Post's van and the Escort. It is undisputed that Bailey was successful in somehow maneuvering around the two oncoming vehicles. After Bailey got around them, it is also undisputed that the van and Escort collided, with the front right of the service van and the front left of the Escort being the point of impact. Bailey turned around his vehicle, drove back, and stopped behind the by-then stopped and collided vehicles. According to Post and Chisholm, Bailey jumped out of his car, jumped on and pounded on Post's van, and cursed Post while engaging in that conduct.

Wells denied having seen Bailey engage in any untoward conduct directed at either Post or Chisholm. Furthermore, Wells testified that no one had gotten out of the Lumina until after the accident had occurred, contrary to the descriptions of Chisholm and Post recited three paragraphs above.

Sprout testified that he had not caught up to the other four vehicles until after the collision had occurred. Some doubt is cast upon the reliability of that testimony, however. For, he claimed that when he arrived on the scene, "one privately owned vehicle and one van [were] facing the direction I was going," while "another van and privately owned vehicle [were] facing the opposite direction that I was going." Moreover, Sprout testified, as to the vehicles' occupants, "several of them [were] outside of the vehicles." Now, it is undisputed that Chisholm and Post never had gotten out of the vans, at least not until after the police had arrived. If Wells is to be believed, no one had gotten out of the Lumina or Escort until after the accident had occurred and after Bailey had stopped his by-then turned-around car. So, if Sprout truly had not arrived until after the collision and after occupants had gotten out of the cars, then there simply could not have been "one privately owned vehicle . . . facing in the direction [he] was going" when he turned onto 145th Street.

The significant point about the time of Sprout's arrival on the scene is revealed by Chisholm's testimony regarding what happened after Bailey purportedly had forced Chisholm to stop at the roadside. According to Chisholm, after that occurred he had given thought to backing up and, then, pulling around the assertedly stopped Lumina, to continue traveling along 145th Street. However, testified Chisholm, when he looked in his rearview mirror,

he discovered that there was a vehicle immediately behind him, so close that he could not even ascertain that it was a pickup truck. Thus, he was blocked front and back, and forced to remain parked at the side of the road, Chisholm testified.

As stated above, Sprout testified that he had not even turned onto 145th Street until after the collision had occurred. He further testified that he first had parked about 100 feet behind Chisholm's service van, but had then pulled up "to within about three car lengths of" that van, after Snow had motioned him (Sprout) to pull up closer. Sprout denied flatly that he had tried or had intended to try to block Chisholm from backing up.

One final incident at the collision-scene must be mentioned. It is undisputed that, after the collision, striking employee Snow had sauntered up to the driver's side of Chisholm's service van, in which Chisholm was waiting for the police to arrive, and had said to Chisholm, "[I]t would be a damn shame that [Chisholm] would be at work and [Snow] would have someone take care of [Chisholm's] kids." At that time, Chisholm estimated, Wells had been standing approximately ten feet in front of Chisholm's service van. However, Chisholm never actually claimed that Wells had heard, or could have heard, what was being said by Snow.

There is no dispute about the events which followed the collision. The police arrived at the scene. Bailly, Lynch, and Snow—but not Chisholm, Post, Ken, Sprout, or Wells—were arrested. Ultimately, the three arrested employees were charged and found guilty of criminal violations in connection with the events that morning. Meanwhile, Post and Chisholm reported their accounts of those events to Respondent. On June 23 Respondent filed unfair labor practice charges against the Union and, on that same date, gave written notice to Sprout that his conduct was under investigation by Respondent.

As mentioned in section I, *supra*, by letter dated July 6 the Union gave notice that the strikers would be returning to work on July 11. Letters dated July 10 were sent to Lynch, Snow, Wells, and Sprout, giving each notice of meetings on July 16 to ascertain their accounts of the events of June 16. Wells and Sprout each did appear for their July 16 meetings. But, on advice of union counsel, each refused to answer any questions. Lacking an explanation by those strikers, Respondent completed its investigation based upon the information available to it and notified Sprout and Wells of the disciplinary action being taken.

Before moving to description of that disciplinary action, this might be a good point to dispose of an argument advanced in connection with Respondent's decision to pursue interviews with Wells and Sprout in mid-July. Respondent is faulted for deciding to conduct its investigation while the criminal investigation was still in progress, with the suggestion that Respondent should have stayed its own investigation until the criminal investigation was completed. The problem with such an argument is that it ignores the position in which Respondent was placed as a result of the Union's offer on behalf of the strikers to return to work.

An employer who believes that some strikers have engaged in strike misconduct is faced with somewhat of a difficult choice when confronting strikers' offer to return to work. Obviously, the Act requires that those strikers be allowed to return to work, if positions are available for them. But, to allow strikers suspected of misconduct to return is to run the risk that it will later be held that the employer condoned their strike misconduct, by the very

fact of having allowed them to return. See, e.g., *United Parcel Service*, 301 NLRB 1142, 1143–1144 (1991), and *Circuit-Wise, Inc.*, 308 NLRB 1091 fn. 2 (1992). On the other hand, if they are not allowed to return to work, and it is later determined that the employer failed to make a good faith effort to complete an investigation of their asserted misconduct, then the employer may be held to have unlawfully refused to allow—or unlawfully delayed allowing—those strikers to return to work. In such circumstances, regardless of other ongoing investigations, it is difficult to fault an employer, such as Respondent, for pressing ahead with its own investigation. Any contrary conclusion would be "to promote the ostrich over the farther-seeing species." *Partington v. Broyhill Furniture Industries*, 999 F.2d 269, 271 (7th Cir. 1993).

By letter dated July 18 Respondent gave notice to Lynch, Snow, and Sprout that each one was terminated. There is no allegation that Lynch's and Snow's terminations had violated the Act. In a letter bearing that same date, Wells was notified of his 30-day disciplinary suspension. The letters sent to Sprout and Wells each charged generally that the employee-addressee had engaged in "acts of misconduct" which "tended to coerce or intimidate [Post and Chisholm] from exercising their rights to continue to work during a strike," as guaranteed by the Act. But, the specific "acts of misconduct" recited in those two letters differ.

Wells, as set forth above, denied having engaged in any of the acts of strike misconduct which had occurred on June 16. In fact, Respondent concedes as much. Thus, in the July 18 letter to him, Respondent states that Wells had been no more than "a passenger" in the Lumina and, more significantly, "did not engage in any acts of intimidation." Nonetheless, Holcomb testified, Wells had been "a party to the action[s]" which had occurred that day, because Wells "was with the entire group," but had done "absolutely nothing to my knowledge to stop those actions from taking place." Although I do not doubt the genuineness of Holcomb's conviction, his conclusion is contrary to principles developed under the Act.

To be sure, it has been concluded that strikers' actions do rise to the level of misconduct when they engage in such activities as tailgating, *NLRB v. Otesgo Ski Club*, 542 F.2d 18 (6th Cir. 1976), deliberately slowing down a vehicle, and then speeding up, in front of a nonstriker's vehicle, *NLRB v. Moore Business Forms, Inc.*, 574 F.2d 835, 843 (5th Cir. 1978), "curbing" or swerving in front of and forcing a nonstriker's vehicle to stop, *Firestone Tire & Rubber Co. v. NLRB*, 449 F.2d 511 (5th Cir. 1971), blocking a nonstriker's vehicle, *Associated Grocers of New England v. NLRB*, 562 F.2d 1333 (1st Cir. 1977), and threatening violence against a nonstriker and his family. *NLRB v. Trumbull Asphalt Co.*, 327 F.2d 841, 844–845 (8th Cir. 1964). No doubt, so also does causing a nonstriker to become involved in a vehicular collision. But, Wells did none of those things and Respondent concedes that he did not engage in any of those activities.

His only affirmative action on June 16 had been to get into a car to follow nonstrikers. Of itself, mere following of nonstrikers does not rise to the level of strike misconduct which forfeits a striker's protection under the Act. See *Gibraltar Sprocket Co.*, 241 NLRB 501 (1979). Nor, to the extent that Wells may have been one of the strikers and strike-supporters to do so, does resort to obscene language and gestures. *Garrett Railroad Car*, 255 NLRB 620, 621 (1981). Beyond that, it cannot be said that Wells

engaged in any activity which caused him to lose the Act's protection extended to strikers.

"Unauthorized acts of violence on the part of individual strikers are not chargeable to other union members in the absence of proof that identifies them as participating in such violence" (footnote omitted), *Coronet Casuals, Inc.*, 207 NLRB 304, 305 (1973), for the "law is settled that an employee's disqualification for reemployment must be based upon evidence that he personally participated in the misconduct." *NLRB v. Wichita Television Corp.*, 277 F.2d 579, 585 (10th Cir. 1960), cert. denied 364 U.S. 871 (1960). Accord: *Stewart Die Casting Corp. v. NLRB*, 114 F.2d 849, 856 (7th Cir. 1940); *NLRB v. Sea-Land Service*, 356 F.2d 955, 966 (1st Cir. 1966), cert. denied 385 U.S. 900 (1966); *Methodist Hospital of Kentucky, Inc. v. NLRB*, 619 F.2d 563, 567 (6th Cir. 1980), cert. denied 449 U.S. 886 (1980).

Of course, bystander-strikers can be held accountable for misconduct which they ratify, counsel or incite, even though they are not actual participants in it. See, e.g., *NLRB v. Sea-Land Service*, supra. For example, in *Auburn Foundry*, 274 NLRB 1317 (1985), a car's passenger (Handshoe) was held to have been "in association" with individuals whom that knew or should have known, when getting into the car, were bent on misconduct.

In the instant case, in contrast, there is no evidence that the strikers and their supporters had been planning on engaging in misconduct at the point at which they got into the cars and began following the service vans from Respondent's facility. So far as the record discloses, they had been intending no more than to follow the vans and engage in picketing at whatever customer-locations those vans happened to stop, a subject to which greater attention is paid below. There is no other evidence of misconduct in connection with the activities of any other strikers, an absence which tends to support a conclusion that the misconduct involving Chisholm and Post had been more spontaneous, rather than arising from some deliberate plan of the Union and its striking supporters.

Beyond that, even had Bailey, the driver of the Lumina in which Wells was a passenger, subjectively been intent on harassing the service van drivers, there is no evidence whatsoever that Wells had been aware of that subjective intention. That is, there is no evidence that Bailey announced whatever improper intention he had formulated when following the service vans. And there is no evidence that could serve as a basis for inferring that Wells likely could have foreseen that Bailey—and, for that matter, Lynch and Snow—would be engaging in misconduct during the course of the ensuing ride.

Finally, even if Wells had mouthed and gestured obscenities at the van drivers—conduct which, standing alone, does not rise to the level of strike misconduct, as discussed above—that is not evidence that he had been counseling or inciting the actual strike misconduct of Bailey, Lynch and Snow. Indeed, from what limited evidence has been adduced concerning him, Bailey appears to have been an individual who needed no counseling or incitement to engage in misconduct.

It might be argued that some evidence of ratification could be inferred from a failure by Wells to intervene to stop the misconduct of Bailey and, later, of Snow. Yet, that is hardly a realistic argument. There is no evidence that Wells had overheard what Snow had said to Chisholm following the collision. Absent such evidence, there is hardly basis for attributing Snow's remarks to

Wells. Beyond that, as an objective matter, a backseat passenger is in a poor position to put a stop to unsafe driving, especially when conducted by a seemingly headstrong driver.

With regard to strikers who observe misconduct by other strikers, the Board and circuit courts of appeals appear to follow a rule parallel to that existing in the torts area: there is no duty to take affirmative action to intervene, absent some special circumstance. See *Beaird Industries*, supra, 311 NLRB at 770 fn. 8. In fact, when misconduct occurs, an uninvolved employee is not even obliged to abandon his/her own protected activity as some sort of protest against another's misconduct. *Garment Workers v. NLRB*, 237 F.2d 545, 550–551 (D.C. Cir. 1956). Imposition of such an affirmative duty, to try to prevent misconduct of others engaged in the same activity protected by the Act, would have too great "a deterrent effect" on the statutorily-protected activity of bystanding employees not involved in that misconduct, under the doctrine of *Burnup & Sims*, supra.

In sum, there is no basis upon which it can be concluded that Wells had engaged in strike misconduct which deprived him of the statutory protection for a striker, under the above-stated principles. As a matter of law, any asserted "good faith" belief that his mere presence and failure to affirmatively act to try to prevent misconduct by others, of themselves, do not constitute strike misconduct. Left, then, for consideration is the threshold question of whether the underlying strike activity by Wells—as well as that of Sprout—on June 16 had, in fact, been activity protected by Section 7 of the Act. That question is addressed at the end of this Section, after discussion of whether or not Sprout had engaged in activity so egregious that it constituted strike misconduct.

The letter which Respondent sent on July 18 attributed to Sprout essentially three specific acts of asserted strike misconduct: "chas[ing] two service vans" driven by nonstriking employees "on interstate highways as well as narrow gravel roads"; "tailgating" Post's van "on Interstate 280" while "a car driven by another picketer swerved in front of Mr. Post's van and applied its brakes"; and, in conjunction with another picketer's vehicle, forcing "Chisholm to stop his van and then" blocking that van so that Chisholm "could not escape the ensuing confrontation" and, as a result, was "subject[ed] to further intimidation by a group of five other picketers who pounded on his van and threatened harm to his wife and kids." Holcomb testified that the letter set forth accurately his reasons for having decided to fire Sprout; he denied that his decision had been based upon Sprout's support for the Union or upon Sprout's participation in the strike against Respondent. However, the evidence adduced creates major difficulties for Holcomb's explanation of his decision to discharge Sprout.

Sprout denied having engaged in any of the above-listed acts of misconduct. As a general proposition, an employee's denial of strike misconduct can constitute evidence sufficient to rebut a charge of strike misconduct. See, e.g., *Teledyne Industries v. NLRB*, 911 F.2d 1214 (6th Cir. 1990).

Based upon some of what has been set forth above, however, it should be evident that Sprout was not always candid when he testified. For, refuted by Bruske was Sprout's testimony that he had not left Respondent's facility in conjunction with the Lumina and Escort, but had intended to head to a specific location not necessarily related to where Post's and Chisholm's service vans might be destined. In fact, testified Bruske, Sprout had been di-

rected to follow the two cars and obtain a customer-location from the occupants of one or the other of those cars when it stopped at a customer-location. Yet, lack of candor in that regard is not necessarily fatal to the totality of Sprout's credibility.

As he was testifying, Sprout impressed me as an individual who did not seek to become involved in controversy, by engaging in imprudent activities. Thus, although he participated in the strike and was admittedly willing to picket at Respondent's and at its customers' locations, there were limits as to how far he was willing to go in support of the strike. That was shown by the record. For example, after the other vehicles left Respondent's facility, they increased their speed on State 61. Because he was not willing to also do so, Sprout testified that he had lost sight of the four vehicles in front of him, even though, based upon Bruske's testimony, Sprout had been directed to follow the cars. In fact, that testimony by Sprout tends to be corroborated by the accounts of Post, Chisholm and Wells. None mentioned having seen Sprout's pickup while traveling on State 61 and on Interstate 280. The fact that Sprout had been unwilling to engage in even the unsafe, though not generally uncommon, practice to speeding is some indication of Sprout's generally cautious approach.

A like demonstration of cautious attitude is revealed by what Sprout did not do at the scene of the collision. Regardless of when he may have arrived there, a subject discussed below, it is uncontroverted that he never got out of his truck, even though all of the other strikers and their supporters had done so. In fact, not only did those others do so, but there is testimony, some undisputed and some apparently confirmed by subsequent criminal convictions, that at least one striker—Snow—and one strike-supporter—Tiny Bailey—engaged in strike misconduct as Sprout sat in his truck. Rather than join in it, or even get out as some form of showing of support for it, Sprout remained in his truck.

To be sure, the logical riposte to that would be that Sprout remained in his truck to continue blocking Chisholm's service van. But, that is not so logical as might appear at first blush. After all, leaving it would not somehow remove the pickup from behind Chisholm's van. Given the situation, certainly Sprout, if truly bent on the misconduct of blocking that van, could fairly safely assume that if he got out of his truck, Chisholm or Post would not jump out, rush over and commandeer the pickup, then trying to back it up. Rather, the fact that Sprout remained in his truck until the police arrived is a further indication of his general unwillingness to become involved in action which could be regarded as too controversial.

In consequence, even though Sprout was not candid in some aspects of his testimony, there is some basis for concluding that he was testifying with candor when he denied having deliberately attempted to position his pickup truck in a manner that would serve to block Chisholm from backing up his service van. And that is the only possible strike misconduct—blocking a non-striker's vehicle, *Associated Grocers of New England v. NLRB*, supra—among all the assertions enumerated in the above-mentioned July 18 letter to Sprout of which there is any evidence to support any of those assertions.

According to that letter, Sprout had been "tailgating" Post's service van while "on interstate highways as well as narrow gravel roads," at the same time as "a car driven by another picketer swerved in front of Mr. Post's van and applied its brakes." In fact,

Post did testify to having been subjected to the type of strike misconduct which Respondent's letter describes. But, Post attributed none of it to Sprout. He did not claim that he had been tailgated by Sprout. He did not claim that he had been subjected to strikers applying their brakes in front of him at the same time as Sprout was immediately behind his service van. In fact, Post testified, generally, only that, while on State 61 and on Interstate 280, "the green truck stayed behind me most of the time." However, Post never claimed that the truck had been driven so close to him that he had regarded it as tailgating his service van. And Post gave no testimony whatsoever about being followed by Sprout on either the first or second gravel roads.

In fact, Chisholm, who seemed no less observant and concerned than Post about had been occurring behind and in front of the service vans, acknowledged that, when the turn had been made onto 145th Street, he had observed no vehicle behind him other than the Lumina and the Escort. In sum, Respondent has presented no evidence that Sprout had tailgated either service van while the two vans traveled on State 61, on Interstate 280, or on the first and second gravel roads. Nor did either service van driver describe any specific conduct by Sprout on those highways and roads that served to facilitate the misconduct of the Lumina and Escort drivers.

It is somewhat of a puzzle that Respondent would have made such seemingly reckless assertions in its July 18 letter to Sprout when it should have known, from their reports to Respondent about the incidents on June 16, that neither Chisholm nor Post would provide testimony in support of those assertions. Some explanation for that may arise in connection with Respondent's unfair labor practice charge in what became Case 33-CB-3503-1.

That charge is dated June 23, while Respondent assertedly was still conducting its own investigation of the June 16 events and, further, almost a month before its July 18 discharge letter to Sprout. Yet, in the "Basis of the Charge" portion of that charge, Respondent had typed, in pertinent part, that the Union "sent two (2) Union agents and [Respondent] employees, Bill Lynch, Dave Wells and Dalen Snow and *ex-employee* Jimmy Sprout to threaten and intimidate Gary P. Chisholm and Thomas J. Post because they wouldn't go out on strike." (Emphasis added.) Now, there can be no question, were Respondent's overall defense concerning him to be credited, that Sprout should not have been regarded as an "ex-employee" so early as June 23.

Holcomb, in effect, blamed the inconsistency on counsel, claiming that he (Holcomb) had not seen the charge, nor reviewed it for accuracy, before it had been filed. Of course, reading is not the only manner in which a document's contents can be communicated to someone—listening to someone else read a document is an alternative which supplies knowledge of it contents to a listener. Beyond that, obviously during a hearing already in progress, counsel was in no position to contradict his own client's vice president and general manager, though it should not be overlooked that there is no representation confirming the accuracy of Holcomb's explanation.

That omission of a representation should not simply pass without a second look. Counsel has been representing Respondent at least since the Union had filed its representation petition during the preceding September. As will be discussed further in section IV, *infra*, during negotiations Respondent had been proposing,

with regard to wage rates, that any collective-bargaining contract contain the name of each unit employee and list that employee's corresponding wage rate. Counsel had been the one conducting those negotiations for Respondent, though Holcomb admitted that he had been making the actual decisions concerning what would be counterproposed and what would be agreed to by Respondent. By June, Respondent had submitted more than one wage counterproposal and each listed all unit employees by name. Thus, counsel possessed seemingly greater knowledge of unit employees' names than might ordinarily be the situation presented in other negotiations, where wage rates were proposed and counterproposed on the basis of job description or classification. And Sprout's name, with a corresponding counterproposed wage rate, appears on each of Respondent's wage lists.

Given those facts, it is difficult to believe any assertion that counsel simply had made a mistake and that the content of the charge in Case 33-CB-3503-1 had been unknown to Holcomb before it had been filed. Holcomb appeared to be a very meticulous individual and the record shows that he was consulted on all decisions and positions advanced on Respondent's behalf. I find it difficult to believe, based upon my observation of Holcomb as he testified and upon the evidence concerning how negotiations proceeded, that he would not have been informed of what the charge would read before it was filed.

The fact is that, on its face, the charge carefully distinguishes Lynch, Wells and Snow as "employees" from Sprout as an "ex-employee." All were named as participants in a purported common enterprise. If one studies the record in this proceeding, as well as the evidence in connection with the negotiations, the single conclusion which emerges is that counsel, also, is a very careful individual. It is hardly consistent with that ongoing course of care that counsel would somehow inadvertently list Sprout as an "ex-employee" if, in fact that had not been Respondent's view of his employment situation.

It is not unprecedented for a client to use counsel as, in effect, a whipping post to disguise the client's own seemingly advantageous agenda of the moment. See, e.g., *Golden Cross Health Care of Fresno*, 314 NLRB 1201, 1209 (1994). Indeed, it does not appear that, from September 1996 through the close of the hearing on March 13, 1998, counsel had acted at any point without consultation with Respondent, always Holcomb. On the other hand, while testifying Holcomb did not appear to be testifying with complete candor about the circumstances surrounding the filing of the charge in Case 33-CB-3503-1. The above-recited observations support that impression. I do not credit Holcomb and I conclude that that portion of the charge warrants the inference that, as early as June 23, Respondent had decided to fire Sprout. When the above-quoted text of the charge became an issue in the instant case, it then was necessary for Holcomb to try to disguise that decision and counsel became an easy mark.

In opposition to that conclusion, it would be logical to question why Sprout would have been singled out by Respondent for, in effect, premature discharge. One judicially-recognized answer is that discharge of even one union adherent might have an "*in terrorem* effect on others," *Rust Engineering Co. v. NLRB*, 445 F.2d 172, 174 (6th Cir. 1971), "by making 'an example' of" that lone individual. *NLRB v. Shedd-Brown Mfg. Co.*, 213 F.2d 163, 175 (7th Cir. 1954). Of course, the strike was still in progress as of

June 23, when Respondent filed the charge. Obviously, a copy of that charge would be served upon the Union. Likely, at least some of the striking employees would become aware of its description of Sprout as an "ex-employee." As a natural consequence of that knowledge, those strikers and others whom they inform of what the charge recites about Sprout, would tend to become less supportive of a continued strike and of the Union, itself, lest they, also, end up in the same position to which the charge relegates Sprout. In addition, his discharge would serve as notice to the Union of what could happen to its other employee-adherents, should the Union continue to object to Respondent's positions.

Why choose Sprout, as opposed to Lynch or Snow? Unlike Sprout, by June 23 those two employees had been arrested. Respondent could likely assume that in due course criminal proceedings would determine their employment fate, if it but awaited the outcome of the criminal process. Beyond that, Sprout was a relatively easy target for Respondent. With no disrespect to him, as discussed above he did not appear to be a person who seeks to move to the forefront of any situation or to make too many waves. Indeed, that attitude may well have been his motivation for not testifying that he had left Respondent's facility on June 16 in conjunction with departure of the vans and cars that morning: he wanted to avoid blame for involvement in events, none of which were of his making, that turned ugly and confrontational. Thus, he later waited in his truck on 145th Street, rather than get out and join the other strikers and their supporters. If so unobtrusive an individual could be fired in connection with the strike, other employee-strikers would naturally become apprehensive about the fate which might be visited upon them and, in turn, deterred from continued lawful strike activity, thereby inherently "imped[ing] and] diminish[ing] their "right to strike," contrary to Section 13 of the Act's express guarantee and to the Supreme Court's concern about deterrent effect on protected activity.

In addition to asserting, without any demonstrable evidentiary support, that Sprout had been tailgating Post on the interstate and on gravel roads, thereby purportedly facilitating others from applying their brakes in front of Post's van and forcing him to slow down to avoid a collision, Respondent's July 18 letter also charges that Sprout "chase[d] two service vans." While inflammatorily-phrased, there is a certain accuracy to that statement. Based upon Bruske's testimony, Sprout had been following the Lumina and the Escort. Of necessity, that meant that he also had been following the two service vans, though his almost immediate loss of contact with them on State 61 would seem to undermine the accuracy of the verb "chase." Even so, Sprout was following, albeit in detached manner, the four-vehicle procession ahead of him. Yet, as pointed out above, merely following a nonstriker, of itself, has been held not to be conduct so egregious that it rises to the level of strike misconduct. *Gibraltar Sprocket Co.*, supra.

As was true with Wells, discussed above, there is no evidence that, by the time that he had left Respondent's facility, Sprout had any idea that Bailey, Lynch or any other striker or strike-supporter had intended to engage in misconduct. Certainly, there is no evidence that Sprout had counseled or incited anyone to do so. In fact, given Sprout's loss of contact with the other four vehicles as they began driving on State 61, and his continued lack of contact with them as they drove on Interstate 280, there is no basis for even inferring that he likely had observed or known about any

misconduct which was occurring on those two roadways. To be sure, he observed from the interstate what was happening on the first gravel road. But, mere observance hardly rises to the level of complicity. Consequently, there is no basis upon which to conclude that Sprout had somehow ratified any misconduct occurring between the onramp to State 61 and 145th Street.

Left, then, for consideration is the assertion of blocking the rear of Chisholm's service van as it sat motionless on the side of 145th Street. At the outset, Sprout denied that he had intended to block Chisholm's van and there is no direct evidence—"competent evidence which, if believed, would prove the existence of a fact at issue without inference of presumption" (citation omitted), *Zaben v. Air Products & Chemicals, Inc.*, 129 F.2d 1453, 1456 (11th Cir. 1997); see also *Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563, 569 (7th Cir. 1989)—of an intention by him to block that van: such as a statement by Sprout expressing that intention. Instead, Respondent relies upon inference for a conclusion that Sprout had harbored that intention: from the accounts of Chisholm and Post that, almost immediately after Chisholm's service van had stopped or been forced to stop, that Sprout immediately had pulled in behind it.

Even if the collision had not actually occurred by the time that Sprout arrived on 145th Street, the fact that he pulled close behind Chisholm's van, assuming arguendo that was what had happened, is not so determinative as Respondent would have it portrayed. As concluded above, there is no evidence that Sprout had been aware of any strike misconduct planned at the time that Sprout followed the other vehicles from Respondent's facility. He had lost contact with those vehicles soon afterward and, thus, it has not been shown that he observed any strike misconduct involving those vehicles while they were on State 61 and Interstate 280. Although he did observe reckless driving on the first gravel road, his observation had been made from his location on Interstate 280.

From there, he had to hasten to catch up with them by exiting the interstate onto Kimberly Road, by traveling along it until he reached the first gravel road, by turning onto and by traveling along it until he reached 145th Street onto which he turned. It is difficult to infer that he had accomplished all of that in so short a time that he had been able to overtake the other vehicles, then still in progress until they turned onto 145th Street, almost immediately after Chisholm had stopped his service van, whatever his reason for doing so. As an objective matter, an immediate arrival by Sprout after Chisholm's van had stopped becomes even more unlikely, given Sprout's demonstrated reluctance to drive at an excessive rate of speed on State 61 and on Interstate 280. If he was reluctant to do so on seemingly paved highways, it is extremely unlikely that he would have abandoned that reluctance and driven at an excessive speed along a two-lane gravel and, then, paved road.

There is no dispute about the fact that Chisholm had been stopped on 145th Street by the time that Sprout arrived there. There is no evidence that Sprout had been aware of why that service van was stopped at the side of the road—no evidence that, as he had traveled along the first gravel road, he would have been able to see what was taking place on 145th Street. Even if Bailey had forced Chisholm's van to stop, there is no evidence that Sprout had been aware that Bailey had done so, as Sprout turned onto 145th Street. So far as the evidence reveals, when he made

that turn Sprout was aware only that the service van was stopped at the side of 145th Street. As a result, there is no objective basis for concluding that Sprout would have realized that, by pulling up behind Chisholm's service van, he would be aiding misconduct by Bailey, by blocking the van from backing up.

Conversely, of itself, stopping behind the van is not inconsistent with an effort to ascertain why the van was stopped and, further, to catch up with the cars, so Sprout could ascertain to which customer-location he was to go. After all, he was supposed to be following to obtain that information. Thus, stopping behind Chisholm's parked service van would not be inconsistent with that course, even if the collision had not yet occurred by the time that Sprout pulled onto 145th Street and even had Sprout pulled quite close to that van.

Of course, if, as he testified, the collision already had occurred by the time that Sprout had turned onto 145th Street, his conduct in pulling behind the parked service van is even less inferable as a nefarious one. At most accident scenes, those who arrive afterward stop as close as is safe to the accident, some to ascertain if help can be rendered, others merely to gawk. Thus, stopping behind Chisholm's service van would not have been inherently inconsistent with Sprout's explanation for having done so.

Given those considerations, it is difficult to deprive an employee of the Act's protection, which the Supreme Court has counseled should be taken away only with an exercise of caution, in a situation where there is no direct evidence of an intention to engage in misconduct, where there is no evidence that the employee had been part of an overall scheme to engage in strike misconduct and possessed only limited knowledge (based upon what Sprout observed from Interstate 280 occurring on the first gravel road) that any might have occurred, and where parking even closely behind the van is as susceptible of legitimate explanation as of nefarious inference. Doing so becomes even less palatable under the Act when taking into consideration, in addition, some of the other evidence, including the testimony by Post and Chisholm.

First, those two service van drivers advanced accounts not altogether consistent with certain undisputed facts. How logical is it that nonstrikers being pursued and harassed by strikers and their supporters would choose not to remain on a well-traveled interstate and, instead, depart from it and start traveling on relatively isolated country gravel roads? Beyond that, Post claimed that, after having turned around in a driveway abutting 145th Street, he had tried to return to Chisholm's location, but that the Escort came up on the right side of his service van and began trying to force him across 145th Street, into a ditch on the far side of that gravel road. Yet, had Post been returning toward Chisholm on the correct side of 145th Street, how would the Escort have been able to maneuver to the right side of Post's service van? Everyone agreed that 145th Street is a country gravel road, not a multi-lane highway. For Lynch to have been able to come along the right side of Post's van, Post already would have had to vacate that lane—the one in which he should have been driving and already been driving on the wrong side of 145th Street.

Second, one aspect of the accounts by Chisholm and Post was contradictory. Each acknowledged that his service van had been equipped with a radio. It allowed drivers to communicate with each other and, in addition, with the dispatcher at Respondent's

facility, Linda Rose. Chisholm denied flatly having spoken with anyone on his van's radio during any portion of the June 16 events, though he also testified that he had overheard communications by Post from the latter's radio. Yet, that testimony—that Chisholm had not actually communicated over his radio—was contradicted directly by Post. The latter testified that, while on Interstate 280, he had radioed to Chisholm “we should get off the interstate.” Asked specifically if Chisholm had spoken back to him, Post answered without hesitation, “Yes.”

That issue of radio-usage by Chisholm, as well as by Post, might seem to be a facially tangential, even collateral, one. Except for a third point which likely explains Chisholm's reluctance to admit having spoken over his van's radio on June 16.

While still at Respondent's facility during the morning of June 16, Bruske testified that he had been listening in, over a radio or a scanner in his possession, to radio communications occurring between service vans and dispatcher Rose. Bruske testified that he had overheard Post and Chisholm report that “they were being followed by strikers” while traveling on Interstate 280. Interestingly, Bruske also testified that neither driver had made mention of being tailgated or subjected to being periodically forced to slow down by the strikers and their supporters' cars, as it might be expected that Chisholm and Post would do if actually encountering such misconduct.

Then, testified Bruske, he overheard Post say that he could not lose the strikers and that the vans “were going to take them down a gravel road to see if they would follow” the vans there. Post never denied having made that statement which, of course, answers the above-posed question as to why Post and Chisholm, assertedly in fear for their safety, would have chosen to leave the interstate: they were trying to get shed of the strikers and their sympathizers. In fact, Post conceded, “I really didn't want to have to stop, pull in to a jobsite, and have three cars full of guys come in after me.”

Later, testified Bruske, he had overheard one or the other driver radio that the strikers and strike-sympathizers “were following [the drivers] on the gravel road.” Significantly, when Bruske overheard Rose asking how many vehicles were pursuing the vans, she was told one driven by Lynch (the Escort) and another by a person unknown to the van drivers (obviously, Bailey driving the Lumina). No mention was made of a pickup truck—an omission which tends to further corroborate Sprout's testimony that he had lost contact with the other four vehicles after entering State 61 and had not again overtaken them until they were stopped on 145th Street.

According to Bruske, he next overheard Chisholm saying that he intended to turn onto another gravel road, “pull over to the side and see if they would go around.” Obviously, that overheard statement refutes any assertion by Chisholm and Post that Bailey had forced Chisholm's van to the side of 145th Street. It also tends to corroborate the testimony by Wells that Chisholm had pulled to the side of the road and stopped, after having turned onto 145th Street. Chisholm never denied with particularity having made those statements to Rose. And she responded to those statements.

According to Bruske, he overheard Rose tell Post, “[I]f they went past Gary, to go up and turn around and come back to ram them,” after which she said that she already had contacted the police. Following such an instruction, of course, would answer

the question as to how the Escort could have gotten on the right side of Post's service van on the return trip: Post had vacated that lane and had crossed into oncoming traffic's lane. And inasmuch as he was headed directly at the Lumina, that message also provides a possible explanation for Lynch's effort to force Post further across the road and into the ditch: he was trying to prevent a head-on collision between Post's van and Bailey's Lumina, by forcing Post's service van off the road or, at least, by forcing Post to stop.

Post denied having tried to hit anyone with his van, denied having told anyone that he had tried to hit someone with his van, and denied having heard anyone say he had used a van to try to strike another vehicle. However, he did not deny having been told by Rose to “try to ram” the strikers and their supporters. Beyond that, there was no evidence, nor even representation, that Rose was not available to testify in the instant proceeding. But, she was never called as a witness. In consequence, the statements attributed to her remain undenied by her.

Bruske appeared to be testifying honestly in connection with the radio messages which he had overheard. In fact, in a more general vein, he was interrogated extensively concerning what had occurred during numerous negotiating sessions. Yet, even though some his testimony was not particularly flattering to Respondent, almost none of his testimony about the negotiations was contested—some indication that Respondent also viewed him as being a forthright witness. I credit Bruske's above-quoted descriptions of the June 16 radio communications which he had overheard.

Those overheard communications virtually obliterate any reliance on testimony by Chisholm and Post in which they attempted to portray themselves as victims. More importantly, with respect to Sprout, those communications and the other above-enumerated factors, show that Post's and Chisholm's testimony about Sprout's conduct on 145th Street cannot be regarded as reliable. The totality of the foregoing considerations fortify the impression that I formed as each testified: that Chisholm and Post were attempting to embellish their accounts to fortify Respondent's positions, without regard to the truth of what had occurred on June 16. I do not credit either service van driver.

Which leads back to Respondent's assertion that Sprout had been trying to block Chisholm's van so that other strikers could harass and intimidate Chisholm. There is no direct evidence of such an intention by Sprout. Chisholm's and Post's descriptions of where Sprout had parked, after arriving at the scene, cannot be relied upon, seemingly having been motivated by no more than an effort to support Respondent's decision, made by June 23, to fire Sprout as a lesson to other strikers and to the Union. Sprout was not always candid, but I believed him when he said that he had not tried to park his pickup so that it would block Chisholm from backing up. Such an action hardly seems consistent with Sprout's above-described circumspect personality. As an objective matter, he seems to have done no more than likely would have been done by anyone who happened upon the scene of an accident: pulled as close to the accident as safely possible, stop and, upon seeing that no one appeared injured, wait for the police. Certainly, Sprout cannot be faulted for having failed to leave the scene of an accident.

In sum, regardless of any “good faith” which Respondent now asserts, a preponderance of the credible evidence not only fails to establish that either Wells or Sprout had engaged in any legally-recognized strike misconduct, depriving them of the Act’s protection, but it supports their denials of having engaged in any such misconduct. Left, then, for consideration is the threshold issue of whether their strike activity that day had been for a purpose protected by the Act.

That is a somewhat deceptive issue. Viewed from Respondent’s perspective, the cars and trucks could have followed the vans from the facility to harass and intimidate the van drivers. In view of what has been reviewed and said above, however, such a suspicion by Respondent is, in fact, not supported by the evidence. There is simply no evidence sufficient to support a conclusion that the Union, or Wells and Sprout, had been bent on misconduct, nor that they had known that car drivers would likely engage in misconduct. Not to be overlooked in that regard is the total absence of evidence of strike misconduct on any other occasion during the almost-month long strike against Respondent. At most, the record supports no more than a conclusion that, once having left Respondent’s facility, Bailey and Lynch decided spontaneously to “hoo-rah” the van drivers and that Snow later decided to join in. Nothing shows that either Wells or Sprout counseled, incited or did anything to ratify such strike misconduct.

The General Counsel encounters a more difficult problem based upon certain testimony provided by Wells. Elicited from him, at two points, were assertions that the strikers and their supporters had intended to engage in “secondary” picketing at customer locations. Truly secondary activity, of course, would not be protected by Section 7 of the Act inasmuch as it violates Section 8(b)(4)(i) and (ii) (B) of the Act.

There is no basis in the record, however, for concluding from Wells’s use of that term that the strikers had left Respondent’s facility on June 16 for the intention of engaging in statutorily-prohibited secondary activity. It cannot be concluded, based upon the evidence, that Wells possessed any greater knowledge about what constitutes true secondary activity than does any other layperson. That is, his conclusionary characterizations cannot be regarded as tantamount to expert testimony. See, e.g., *United States v. Washington*, 106 F.3d 983, 1009 (D.C. Cir. 1997); *Wright v. Willamette Industries*, 91 F.3d 1105, 1108 (8th Cir. 1996); *Waldorf v. Shuta*, 142 F.3d 601, 625 (3d Cir. 1998). His characterizations of the intended purpose of the picketing can only be regarded as lay opinion.

Federal Rules of Evidence Rule 701 imposes two requirements for lay opinion to be considered reliable. The first is that it must be “rationally based on the perception of the witness”—upon “the personal observations of the witness.” (Citation omitted.) *Carter v. Decisionone Corp. Through C. T. Corp.*, 122 F.3d 997, 1005 (11th Cir. 1997). See also *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997). Of course, Wells had been present near the end when Bruske dispatched strikers and their supporters to locations of Respondent’s customers. But, there is no evidence that Bruske actually had issued instructions for picketing there to be extended to the customers, as opposed to being confined to the service vans, a subject discussed more below. In fact, no particularized evidence whatsoever was developed as to what the strikers and their supporters had specifically been told by

Bruske. As a result, there is no basis for concluding that the “secondary” characterization by Wells had been based upon anything said by Bruske or by any other official of the Union. Lacking evidence of a factual basis for that characterization, the most that can be said about it is that Wells was expressing no more than his personal verbal-shorthand for the picketing, see, e.g., *United States v. Leak*, 123 F.3d 787, 795 (4th Cir. 1997), rather than an account of the Union’s intentions.

In that respect, it should not escape notice that there is no evidence of any actual secondary picketing by the Union’s supporters at any customer locations. Obviously, that could not have occurred at the customer locations to which Chisholm and Post were traveling on June 16; their trips were interrupted. Yet, the evidence discloses that Bruske had engaged in a process of dispatching various strikers and their supporters to various customer locations. One was supposed to be obtained by Sprout when he caught up with the Lumina and the Escort. Yet, there is no evidence that the Union had engaged in picketing which violated Section 8(b)(4)(i) and (ii) (B) of the Act at any customer location to which the strikers and their supporters had gone during the course of the strike against Respondent. In the totality of these circumstances, characterization by Wells will not, standing alone, serve to establish as fact an intention by the Union and its employee-supporters to engage in secondary picketing and, as a result, an intention to engage in conduct not protected by Section 7 of the Act.

That said, the obvious question arises concerning what activity at customer locations the strikers could have engaged in and be protected by Section 7 of the Act. So far as the record discloses, that had been ambulatory picketing, an activity which is not proscribed by the Act. See *Teamsters Local 807 (Schultz Refrigerated Service)*, 87 NLRB 502 (1949), and *Teamsters Local 592 (Estes Express Lines)*, 181 NLRB 790 (1970).

Of course, ambulatory picketing must comply with common situs and reserved gate requirements. See *Allied Concrete, Inc. v. NLRB*, 607 F.2d 827 (9th Cir. 1979); *Teamsters Local 108 (DeAnza Delivery System)*, 224 NLRB 1116, 1119–1121 (1976); *Teamsters Local 612 (AAA Motor Lines)*, 211 NLRB 608, 610 (1974). But there is no evidence that the Union had not instructed its strikers and their supporters not to comply with whatever was necessary to engage in lawful ambulatory activity. In consequence, there is no basis for concluding that any of the strikers had intended to engage in activity not protected by the Act on June 16. So far as the evidence shows, they had been dispatched to engage in strike-related lawful ambulatory activity and, thus, had been engaged in activity protected by Section 7 of the Act.

In conclusion, on June 16 Wells and Sprout were among employees who set out from Respondent’s facility to engage in activity protected by the Act. Respondent may not have known specifically what that activity would be, but it did have knowledge that the striking employees were following the vans in connection with the strike and seemingly did intend to engage in activity related to that strike. Certainly, as quoted above, Post, who made a report to Respondent following the events of June 16, seemed to understand to objective of the strikers and their supporters: “I really didn’t want to have to . . . pull in to a job site, and have three cars full of guys come in after me.” Thus, the requirement of employer knowledge—or, at least, suspicion or belief, see *Handi-*

cabs, Inc., supra, 318 NLRB at 897—has been established. Even if Respondent genuinely did believe that the relatively limited strike-related activities of Wells and Sprout rose to the level of misconduct, in fact neither Wells nor Sprout engaged in any of the statutorily-recognized misconduct which actually did occur that day. Neither of those employees were “in fact, guilty of . . . misconduct,” *NLRB v. Burnup & Sims, Inc.*, supra, sufficient to deprive their continuing protection under the Act as strikers. Therefore, by discharging Sprout and by suspending Wells, Respondent violated Section 8(a)(1) of the Act.

IV. ALLEGED REFUSAL TO BARGAIN IN GOOD FAITH

As mentioned in section I, supra, it is alleged that Respondent failed and refused to bargain in good faith with the Union, following the latter’s certification as the exclusive representative of employees in the appropriate bargaining unit described in that same Section. More specifically, the General Counsel alleges that Respondent conducted its negotiations in a manner intended to frustrate bargaining and to prevent agreement. In resolving such allegations it is necessary to evaluate the negotiations in the context of two fundamental policies.

One is the policy of freedom of contract. *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 107–108 (1970). The other, enunciated in Section 1 of the Act, is the policy of “encouraging the practice and procedure of collective bargaining” for the ultimate objective of “eliminat[ing] the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate those obstructions.” “The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace,” the Supreme Court stated in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1939). Accomplishing that objective “to some extent” limits the policy to freedom of contract by the “[v]arying practices in enforcing the Act,” the Court stated in footnote 6 of *H. K. Porter v. NLRB*, supra.

One such practice is the statutory mandate that employers must bargain collectively with representatives certified as the exclusive bargaining agents of those employers’ employees. The extent of that obligation is set out in Section 8(d) of the Act: “to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement . . . , and the execution of a written contract incorporating any agreement reached.” Nevertheless, in obvious deference to the fundamental policy of freedom of contract, Section 8(d) continues, “such obligation does not compel either party to agree to a proposal or require the making of a concession[.]”

In consequence, although the Act “presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract,” *NLRB v. Insurance Workers*, 361 U.S. 477, 485 (1960)—“to enter into sincere, good faith negotiations . . . with an intent to settle the differences and to arrive at agreement,” *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210, 215 (8th Cir. 1965)—“the Act itself does not attempt to compel” adjustments and agreements. *NLRB v. Jones & Laughlin Steel Corp.*, supra. For, “it was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement.” *H. K. Porter Co. v. NLRB*, supra, 397 U.S. at 103–104.

In that respect, it must not be concluded that a respondent violates the Act only if that respondent seeks altogether to avoid reaching agreement on terms for a collective-bargaining contract. A violation can also occur based upon a lesser desire. “Collective bargaining . . . is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of ‘take it or leave it,’” *NLRB v. Insurance Workers*, supra, and, therefore, parties involved in it “may not have a mind ‘hermetically sealed’” which breeds “such Fabian tactics as will practically render abortive the statutory right of the employees.” *Great Southern Trucking Co. v. NLRB*, 127 F.2d 180, 185 (4th Cir. 1942), cert. denied 317 U.S. 652 (1942). Because the Act prohibits “mere pretense at negotiation with a completely closed mind and without a spirit of cooperation and good faith,” *NLRB v. Holmes Tuttle Broadway Ford*, 465 F.2d 717, 719 (9th Cir. 1972), a respondent no less violates the Act when it “engage[s] in a pattern of conduct evidencing a preconceived determination not to reach agreement except on its own terms, irrespective of the Union’s bargaining powers, approach, or techniques.” *Pease Co.*, 237 NLRB 1069, 1070 (1978). See also *Endo Laboratories*, 239 NLRB 1074, 1076 (1978). “A refusal to negotiate *in fact* as to any subject which is within [Section] 8(d), and about which the union seeks to negotiate, violates [Section] 8(a)(5) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and all in good faith bargains to that end.” *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

It is within the context of the foregoing policies that evaluation must be undertaken of specific allegations of trying to frustrate bargaining and to prevent agreement. In doing so, attention must be paid to the respondent’s “conduct in the totality of the circumstances in which bargaining took place.” *NLRB v. Billion Motors, Inc.*, 700 F.2d 454, 456 (8th Cir. 1983). “The picture is created by a consideration of all the facts viewed as an integrated whole.” *NLRB v. Stanislaus Implement & Hardware Co.*, 226 F.2d 377, 381 (9th Cir. 1955). To accomplish that, the Board has enumerated specific areas to which it looks: delaying tactics, unreasonable bargaining demands, unilateral employment changes, efforts to bypass employees’ bargaining representative, failure to designate an agent with sufficient bargaining authority, withdrawal of agreed-upon proposals, and arbitrary scheduling of meetings, as well as conduct occurring away from the bargaining table. *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1974).

As is disclosed by even a cursory review of the Amended Consolidated Complaint, most of those areas are not ones brought into issue in the instant case. Nevertheless, it has never been required that a respondent must have engaged in the entirety of those enumerated activities before it can be concluded that bargaining has not been conducted in good faith. After all, “a piece of fruit may well be bruised without being rotten to the core.” *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 880 (1984). Avoidance of the statutory bargaining obligation can be demonstrated without engaging in wholesale and wideranging activities in every one of those areas—without demonstrating flagrantly that it has no intention of reaching agreement. Rather, “bad faith is prohibited though done with sophistication and finesse.” *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 232 (5th Cir. 1960).

Here, Respondent did engage in unlawful conduct away from the bargaining table, as concluded in sections II and III, supra.

Yet, there is no basis for concluding that the prohibition and threats to enforce it by relatively low-level supervisors, and the discipline of strikers, somehow naturally “reflect[] an interest on the part of the Respondent[] to negotiate without any intention of reaching agreement.” *American Commercial Lines*, 291 NLRB 1066, 1080 (1988). Certainly, there is “no presumption that an employer’s unfair labor practice automatically precludes the possibility of meaningful negotiations,” *NLRB v. Cauthorne*, 691 F.2d 1023, 1025 (D.C. Cir. 1982), nor that it inherently contributes to unlawful deadlock in negotiations. See *Litton Systems*, 300 NLRB 324, 330 (1988). Accordingly, while Respondent did engage in unfair labor practices, away from the bargaining table, that unlawful conduct lacks sufficient nexus to the negotiations to be regarded as an indication of intention to frustrate bargaining and to prevent agreement.

Beyond that, the record discloses that Respondent did meet frequently with the Union, did not delay in doing so, did not arbitrarily schedule meetings, did not make any unilateral changes prior to the allegedly unlawful one concerning wages on June 29, did not try to bypass the Union by dealing directly with employees, did not fail to designate a bargaining agent with sufficient bargaining authority, and did not withdraw previous agreements upon proposals. Rather, intention to frustrate bargaining and avoid agreement, it is alleged, is shown by the substance of a number of proposals advanced by Respondent.

Of course, as set forth above, the Act does not intend “that the Government would . . . step in, become a party to the negotiations and impose its own views of a desirable settlement.” *H. K. Porter Co. v. NLRB*, supra. See also *Management Training Corp.*, 317 NLRB 1355, 1357–1358 (1995). A necessary corollary is that the Board is not permitted to “scrutinize bargaining proposals to see if they are sufficiently generous,” *Modern Mfg. Co.*, 292 NLRB 10, 10 (1988), and must “avoid making purely subjective judgments concerning their contents.” *American Commercial Lines*, supra, 291 NLRB at 1078–1079. Having said that, however, the Board is not prohibited altogether from scrutinizing the substance of bargaining proposals, though for a quite different purpose.

That purpose is to ascertain whether bargaining is being conducted through the tactic of “sophisticated pretense in the form of apparent bargaining sometimes referred to as ‘shadow boxing’ or ‘surface bargaining,’” *Continental Insurance Co. v. NLRB*, 495 F.2d 44, 48 (2d Cir. 1974), whereby a party goes through the motions of negotiating without, in fact, any intention of trying to reach agreement or, alternatively, with a “take it or leave it” attitude. “Consequently, to sit at a bargaining table, or to sit almost forever, or to make concessions here and there, could be the very means by which to conceal a purposeful strategy to make bargaining futile or fail.” *NLRB v. Herman Sausage Co.*, supra. “Sometimes, especially if the parties are sophisticated, the only indicia of bad faith may be the proposals advanced and adhered to,” *NLRB v. Wright Motors, Inc.*, 603 F.2d 604, 609 (7th Cir. 1979), and “if the board is not to be blinded by empty talk and by the mere surface [m]otions of collective bargaining, it must take some cognizance of the reasonableness of the positions taken by the employers in the course of bargaining negotiations.” *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (1st Cir. 1953), cert. denied 346 U.S. 887.

“The reasonableness or unreasonableness of demands are among the factors which the fact finder can consider in the difficult task of laying bare the subjective intent of the parties.” *NLRB v. Arkansas Rice Growers Assn.*, 400 F.2d 565, 572 (8th Cir. 1968). Not to evaluate whether or not those proposals are sufficiently generous, but rather to reach determinations in two other areas.

The first is to compare what the employer proposes in light of the employees’ employment terms and conditions before they elected a collective-bargaining representative. To be sure, standing alone, proposals that represent concessions or reductions in those terms do not necessarily warrant a conclusion that bargaining is not been conducted in good faith. See, e.g., *AMF Bowling Co. v. NLRB*, 63 F.3d 1293, 1300–1303 (4th Cir. 1995), and *Hamady Bros. Food Markets*, 275 NLRB 1335, 1337 (1985). Still, when employees elect a bargaining agent which is immediately confronted with proposed reductions in existing employment terms and conditions, there is some basis for questioning whether such proposals are punitively motivated—are intended to penalize employees for the very fact of exercising their statutory right of electing a bargaining agent and, beyond that, to impress upon them that they continue not to enjoy statutory protection to which the Act entitles them. Those are the types of statutory vices underlying the conclusion that “bargaining from scratch” threats violate the Act. See, e.g., *TRW-United Greenfield Division v. NLRB*, 637 F.2d 410, 412 (5th Cir. 1981), and *NLRB v. Suburban Ford, Inc.*, 646 F.2d 1244, 1247–1249 (8th Cir. 1981).

Second, proposals can validly be evaluated in light of the Act and the role which Congress has accorded under it to parties, in the overall interest of the collective-bargaining process intended to promote industrial peace. For example, those statutory interests are compromised by proposals “which would exclude the labor organization from any effective means of participation in important decisions affecting the terms and conditions of its members” (footnote omitted), *United Contractors, Inc.*, 244 NLRB 72, 73 (1979), and which “strike[] at the very heart of the Union’s representative function to bargain collectively on behalf of the unit employees” and “effectively destroy the Union’s capacity for resolving disputes on the unit employees’ benefits.” *Modern Mfg. Co.*, supra, 292 NLRB at 11. Examination of proposals’ substance may also reveal what Chief Judge Edwards characterized as “de-collectivization” of the collective-bargaining process, *NLRB v. McClatchy Newspapers, Inc.*, 964 F.2d 1153, 1173 (D.C. Cir. 1992), a concept discussed further below. Proposals which can be so categorized “contain terms so hostile to the role of the other sides’ bargaining representatives,” *NLRB v. Tomco Communications*, 567 F.2d 871, 881–882 (9th Cir. 1978); see also *NLRB v. Patent Trader, Inc.*, 415 F.2d 190, 198 fn. 3 (2d Cir. 1969), affd. en banc 426 F.2d 791 (2d Cir. 1970), or to the bargaining process contemplated by the Act, see *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404 (1982), and *McClatchy Newspapers, Inc. v. NLRB*, 131 F.3d 1026, 1031–1033 (D.C. Cir. 1997), that those proposals can be a basis for a conclusion of failure to bargain in good faith.

Even so, mere examination of proposals hardly concludes the scrutiny which must be undertaken to ascertain if such a failure had occurred. Though a particular proposal appears onerous, the party who makes it may have a legitimate business purpose for

having advanced it. "Every position on issues of mandatory bargaining . . . must reflect a legitimate business purpose, otherwise the company has not bargained in good faith." *NLRB v. J. P. Stevens & Co.*, 538 F.2d 1152, 1165 (5th Cir. 1976). Where the justifications advanced are "patently improbable" their very assertion suggests an inference that the proposal or proposals were not made in good faith. *Queen Mary Restaurant Corp. v. NLRB*, 560 F.2d 403, 409 (9th Cir. 1977); *Glomac Plastics, Inc. v. NLRB*, 592 F.2d 94, 98 (2d Cir. 1979).

Nor does analysis of proposals cease with consideration of only their substance and of the legitimacy of the reasons advanced for them. Other "significant manifestations of bad-faith bargaining are a refusal to budge from an initial bargaining position, a refusal to offer explanations for one's bargaining proposals (beyond conclusional statements that this is what a party wants), and a refusal to make any efforts at compromise in order to reach common ground." *John Ascuaga's Nugget*, 298 NLRB 524, 527 (1990), *enfd.* in pertinent part 968 F.2d 991 (9th Cir. 1992). In other words, it is necessary to review the course of negotiations concerning proposals to ascertain the extent to which a party advancing them is willing to modify, discuss modifying or abandon those proposals and, conversely, to discuss accepting and to accept proposals by the other party. *American Commercial Lines*, *supra*, 291 NLRB at 1079; *Genstar Stone Products*, 317 NLRB 1293, 1293 (1995). Such a review may further reveal whether or not a party's position is lawful "firmness," *Hamady Bros. Food Markets*, 275 NLRB 1335, 1337 (1985) or, conversely, is "the very means by which to conceal a purposeful strategy to make bargaining futile or fail." *NLRB v. Big Three Industries*, 497 F.2d 43, 46 (5th Cir. 1974).

Turning to the facts of the instant case, as might be expected the Union made a series of initial proposals which, if accepted, would have provided unit employees with significantly improved wages, benefits and employment terms and conditions. Respondent countered with a series of initial counterproposals, most of which effectively rejected the improvements- proposals made by the Union. However, the General Counsel alleges that many of those counterproposals, by their terms and in light of the ensuing negotiations regarding them, demonstrated Respondent's intention to frustrate bargaining and to prevent agreement on terms for a collective-bargaining contract.

To support that allegation, the General Counsel points to certain counterproposals which would have relegated unit employees to employment terms less advantageous than had been the fact before they had elected the Union as their bargaining agent. Respondent accomplished that, it is alleged, by three means. First, it counterproposed complete elimination of overtime pay after eight hours of work, of the existing profit-sharing/pension plan, of the existing 40-hour workweek guarantee, of existing paid breaks, and of all existing employment practices. Second, Respondent counterproposed reduction, but not elimination, of vacation benefits and in the number of paid holidays. Finally, the initial counterproposal increased the burden of unit employees by limiting eligibility for receiving paid holidays, by increasing the cost of health benefits, and by introducing mandatory overtime.

There is no argument about the fact that Respondent had made those counterproposals. Indeed, Holcomb testified that they had been motivated by a tactical consideration relating to the negotia-

tions: "Because [they were] a starting point of negotiations. If I could go further, it was just like us selling lift trucks. We have to start at one point in selling a lift truck and the customer starts at another point." As the two sides move from their respective initial figures, testified Holcomb, "[W]e have got to agree some place."

The General Counsel further alleges that Respondent's intent to frustrate bargaining and to prevent agreement is shown by certain counterproposals pertaining to the above-mentioned area of the Act and of the role which Congress has accorded under it to parties engaged in the overall collective-bargaining process. Thus, it is alleged that Respondent initially counterproposed an overbroad management rights provision which would curtail employees' statutory rights, that wages must be negotiated on an employee-by-employee basis, that no contractual provision regarding seniority be included in a contract, and that office clerical employees be removed from the certified bargaining unit.

As with the proposed eliminations, reductions and increased employment requirements, there is no disagreement that the counterproposals enumerated in the preceding paragraph had been ones submitted by Respondent. With respect to management rights, wages and seniority, as well as with regard to certain other proposals related to them, Respondent adhered to its initial position. As will be seen, its basic reason for doing so had been Holcomb's desire to preserve power to continue making decisions in those areas, as it had been doing before the Union's certification. In connection with the office clericals, a different reason was advanced.

Proposed removal of hourly office personnel from the bargaining unit

As set forth in section I, *supra*, the certified bargaining unit included all full-time and regular part-time hourly employees. No one contests the fact that office clerical employees are included in that bargaining unit. To the contrary, when it filed its representation petition, the Union had sought to have office clerical employees excluded from the unit. But, Holcomb admittedly had objected to doing so and had instructed counsel to seek their inclusion in the unit: "it we are going to have to have a union election let's have everybody" vote, testified Holcomb. So, Respondent insisted upon their inclusion and the Union acquiesced to doing so.

In the initial counterproposal Respondent's recognition provision tracked the certification in describing employees included and excluded from the unit, with one prominent exception. It defined "employee" in a manner which excluded "all hourly office personnel." No one contests the fact that "hourly office personnel" would embrace the office clerical employees whom Respondent earlier had sought to have included in the bargaining unit. Holcomb explained that he had decided to "get them out of" the bargaining unit to "give us more personnel in the office to handle" information that is "sensitive," such as "personnel matters and whatever." Yet, that explanation encounters problems, in view of the other evidence.

First, it brings into question why Respondent had insisted upon inclusion of office clerical employees if they were handling "sensitive" information. Seemingly that would have been no less a concern before than after the representation election. "At that time I probably wasn't thinking good at all over anything,"

claimed Holcomb. That is not inherently an illogical explanation. In fact, during negotiations in connection with the counterproposal, Respondent explained to the Union “that before [it was] union some things weren’t confidential that might be now because of the union situation so therefore in [Respondent’s] opinion [one of the clericals: Shirley Grunder] was a confidential employee.” Yet, Respondent had been advised by experienced counsel throughout the representation proceedings. Given that fact, it at least raises an eyebrow that Holcomb would not likely have been alerted to possibility “sensitiv[ity]” concerns when he originally expressed a desire to have office clerical employees included in the unit in which the election would be conducted.

Second, as set forth in Section I, *supra*, the certified unit excludes “confidential employees.” Seemingly, that exclusion would address and resolve any purported concern about unit-inclusion of office clericals who might have “access to confidential business information” (footnote omitted) under the “labor nexus test”. *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 189–190 (1981). Yet, rather than simply relying upon that stated exclusion, Respondent counterproposed a definition of “employee” that would exclude the entire class of employees whose inclusion in the bargaining unit it had sought originally. And, as discussed below, in the end it agreed to exclusion of only one as being confidential, in lieu of removing the entire class as initially counterproposed.

As to negotiations concerning that counterproposal, upon seeing it the Union objected based upon the Respondent’s original insistence that office clericals be included in the unit and, also, upon the fact that the Union was uncertain of the legality of removing employees from a newly certified bargaining unit. Respondent provided citations to authority allowing parties to do so. Eventually, the difference was resolved by removing only “secretary/receptionist” Grunder from the unit definition of “employee” as counterproposed by Respondent.

Proposed elimination of existing employment terms

Holcomb acknowledged that prior to the certification Respondent had been paying employees time-and-a-half for work in excess of eight hours a day, had allowed unit employees to participate in Respondent’s profit-sharing/pension plan, had guaranteed 40-hour workweeks, and had allowed employees working on certain jobs to enjoy two 15-minute breaks, one in the mornings and the other in the afternoons, while other employees were allowed to take breaks as they needed to do so and as work allowed. The Union initially proposed that any collective-bargaining contract provide for overtime pay for work performed in excess of eight hours a day and 40 hours a week, provide time-and-a-half for nonovertime Saturday work and double time for nonovertime Sunday work, provide guaranteed 4 hours of pay when employees were called in for non-regularly scheduled service calls, and provide certain proposed procedures for administering those provisions.

The Union also initially proposed, with respect to Respondent’s profit-sharing program, vesting for all unit employees upon contract-ratification and release of funds to each employee, with Respondent thereafter contributing \$61 per week per unit employee “on the payroll for thirty (30) days or more” to the Central States Southeast and Southwest Areas Pension Fund for class 15A and,

as well, certain additional pension-related features. In addition, the Union proposed retention of the guarantee of not less than 40 hours of work each week, coupled with designated normal daily work hours, premium pay for employees required to work before or after those designated hours, and prohibition on requiring any employee to work more than 10 hours a day. It also proposed initially two daily breaks, one to be taken during the first 4 shift hours and the other to be taken during the last 4 shift hours.

Respondent made no specific counterproposal concerning profit sharing/pension plan, nor concerning breaks and 40-hour work-week guarantee. Its initial counterproposal provided for overtime pay, but only when more than 40 hours of weekly work was performed. As negotiations progressed, Respondent agreed eventually to restore most of those benefits which unit employees had enjoyed before electing to be represented by the Union. Thus, in its May 22 revised counterproposal Respondent included provision of overtime pay for work in excess of 8 hours a day. Still, given Holcomb’s above-mentioned “starting point of negotiations,” it is significant that Respondent never explained with particularity why it had abruptly chosen to restore that employment term. And there is no evidence of any trade-off made by the Union to achieve Respondent’s willingness to restore it.

In that same May 22 revised counterproposal Respondent added a provision whereby technicians would be allowed morning and afternoon 15-minute breaks. Again, there is no particularized evidence of Respondent’s specific reason for having added that counterproposal at that stage of negotiations. What is shown is that the Union still objected to only allowing scheduled breaks for technicians, without a similar expressed allowance for other unit employees. In apparent response to that objection, during the June 11 negotiating session Respondent agreed to add that unit employees other than technicians “may take breaks to go to the bathroom, use the vending machines and smoke” in other than a designated nonsmoking area, “so long as the breaks are not excessive in number or duration.” The Union did not disagree with the substance of that proposal. It did argue that the breaks provision should be included in a maintenance of standards article of any collective-bargaining contract which the parties executed. As will be discussed below, Respondent objected to any maintenance of standards provision. During the negotiating session of November 22 the Union agreed to its inclusion in the “*HOURS OF WORK*” article of the contract, where Respondent wanted it to appear.

Respondent adhered to its initial position on pension-elimination until it submitted a May 30 revised counterproposal in which, for a reason not revealed by the evidence, it included the provision, “Eligible employees may participate in [Respondent’s] Profit Sharing Plan,” under plan documents governing eligibility, benefits and conditions for obtaining benefits, and with Respondent reserving “the right to change the terms and benefits of the Profit Sharing Plan during the term of this Agreement, so long as such changes are uniform four [sic] all hourly participants in the Profit Sharing Plan.” The Union bridled somewhat at agreeing to allow Respondent to make changes as it saw fit. However, Respondent pointed out that its revised counterproposal left unit employees participating in the same plan in which they and non-unit employees already were participating. During the July 17 negotiating session the Union agreed to that revised counterproposal concerning profit-sharing/pension.

No agreement was ever reached to restore the 40-hour workweek guarantee which Holcomb admitted that unit employees had enjoyed prior to selecting the Union to represent them. The Union objected to its elimination on the basis that Respondent would be allowed to reduce workweeks below 40 hours for unit employees, while assigning their work to supervisors and temporary workers, perhaps even ones obtained from temporary employment placement agencies. In the circumstances, that concern was not simply an abstract one. For, in its initial counterproposal, in connection with management rights, Respondent had included a provision reciting, "Due to the business requirements of the Employer's business, Supervisors and other employees employed by the Employer may perform work that is normally performed by employees covered by this agreement."

In response to the Union's objection, Respondent argued that there were no guarantees in life, pointing out that it was not guaranteed business by its customers. It agreed that the counterproposal would allow it to siphon off unit work to supervisors and nonunit personnel, but told the Union that it "had to trust [Respondent] that that wasn't [its] intent." Yet, it rebuffed the Union's proposal that such an assurance be included in a written contract.

During the negotiating session of November 26 the Union acquiesced in Respondent's unwillingness to restore the 40-hour workweek guarantee. During the December 23 negotiating session Respondent relented somewhat in its counterproposal allowing it to assign supervisors and nonunit personnel to perform unit work. It proposed adding the qualification that supervisors and part-time workers "shall not be hired or appointed for the sole purpose of performing barg[ain]ing unit work."

Proposal to eliminate existing practices

Considerable evidence was adduced in connection with the alleged elimination of past practices counterproposal. So far as the record discloses, prior to election of the Union there were no documents enumerating employment practices. The Union initially proposed that "subject to the following provisions, . . . all conditions of employment . . . relating to wages, hours of work, overtime differentials and general working conditions shall be maintained at not less than the highest standards in effect" when a contract is executed. That proposal continues by requiring that "currently existing conditions and/or privileges (see attached list)" must "remain unaltered, unless improved upon and mutually agreed to by the unaffected parties prior to implementation" during the term of the contract.

Respondent initially counterproposed, "Past practices existing prior to this agreement are null and void." In addition, it initially counterproposed that an Entire Agreement provision stating, to the extent pertinent, that each party had had "the opportunity to make demands and proposals" and "that the understandings and agreements arrived at" are set forth in the contract. The Union saw that provision as a possible contractually-allowable means for changing existing standards.

The "attached list" was not supplied by the Union to Respondent until the negotiating session of April 22. It was a one-and-a-quarter-page list of practices, discussed in somewhat greater detail below. During that session and the one which occurred on the following day, Respondent characterized the list as "ridiculous." It

is undisputed that, as former business agent Bruske testified, Respondent also said it would furnish whatever employees needed to perform their work, without need for it "to be in writing," and, further, that it was Respondent's "inherent right to determine what" else would be furnished "and that just because [Respondent is] union it continued to be [Respondent's] inherent right" to make such determinations. During the May 22 negotiating session, testified Bruske without dispute, Respondent asserted that things such as breaks, telephone usage and bathroom usage were "the way it was now and [it] had no intent of changing anything," and, moreover, refused to reduce to writing any existing practices.

Bruske acknowledged that, during the June 11 negotiating session, Respondent had expressed willingness to negotiate about any employment practices "put on the table" and, further, had expressed willingness to put any agreements reached about them "in the contract and sign off on it." However, asserted Respondent, it was not willing to submit to arbitration concerning such trivial matters. Yet, it is uncontested that when the Union attempted to address that assertion, by proposing that any standards or practices provision be exempted from arbitration—so that employees would have at least some limited contractual avenue for bringing deficiencies to Respondent's attention—Respondent still was unwilling to agree to append a list of practices to any contract. Instead, it pointed out that Holcomb had an open door policy of which employees could avail themselves to bring problems to Respondent's attention.

During the July 7 negotiating session, it is not contested, Respondent took the position that it believed it needed to have all agreements embodied in a written contract, so it would know what it was obliged to do. Thus, it demanded that the Union "put . . . on the table" any practices that it wanted to have continued and, then, they would go into the contract if Respondent agreed to them and would be subject to arbitration. Nonetheless, it is undisputed, Respondent maintained that the Union's April list was "ridiculous" and was not worthy of possible submission to arbitration. Yet, Respondent did not address the Union's June 11 modified proposal to exempt practices on that list from arbitration. Eventually, the Union made two other relatively minor changes in its proposed maintenance of standards list. Respondent made no change in its past-practice-elimination and Entire Agreement counterproposals. Ultimately, the Union did agree to the Entire Agreement counterproposal, but no agreement was reached on the list of practices nor on a more general maintenance of standards provision by the end of the December 23 negotiating session.

Given the allegation concerning past practices, as one indicium of bad-faith bargaining, some further attention must be paid to the Union's proposed list, though I have no intention of reciting each item on it. In general, it is subdivided into three sections. The first is a list of existing practices which the Union proposed be perpetuated during the contract's term. Holcomb never denied that those practices had existed, though he did testify that smoking was not allowed in certain areas.

The second subsection addresses a single subject: "Employees will be allowed to take breaks on company premises and lunches wherever they desire." Holcomb acknowledged that some employees did take breaks wherever it was feasible to do so, in light of the jobs that they were performing. He pointed out, however,

that breaks and lunches could not be taken in his office, the general office or the conference room.

The final subsection is similar to the first. In it are enumerated various benefits which employees will continue to enjoy. For the most part, Holcomb agreed that the employees—or, in a few instances, some of them—did enjoy those benefits, albeit limited in some regards. For example, he agreed that certain employees were provided with fans in certain situations. He agreed that employees could purchase postage stamps from Respondent, if they were available for purchase. He agreed that limited personal-use purchases could be made from the warehouse parts department and that employees in some areas were allowed to play radios and CD-players, so long as they had headphones. Sometimes, he acknowledged, employees could work in the shop after hours and during weekends, so long as they had prior supervisory permission to do so. And some employees were allowed to use service vans to commute to and from work.

Therefore, it is pretty much undisputed that the Union's April 22 list essentially recited accurately practices which had prevailed in Respondent's Davenport facility. When testifying about Respondent's objections to the items enumerated on that list, however, Holcomb renewed the objection to almost every one, made during negotiations, that Respondent did not want to submit disputes about it to arbitration. For example, the proposal to perpetuate existing eating, drinking, and smoking policy, Holcomb rejected because "we don't want some arbitrator to come back and tell us that we made the right decision or the wrong decision on a small issue." Similarly, in connection with the proposal to continue providing "supplies needed for the job," Holcomb complained, "I don't want an arbitrator to tell what supplies we have to have to get the job done." He voiced that same objection in connection with the proposed continuance of supplying first aid kits; "I don't want an arbitrator to tell what we need." In like vein, asked to explain why he had objected to proposed continuance of monthly safety meetings, Holcomb answered, "[I]t is required we have monthly safety meetings and it should [not] be necessary for an arbitrator to be involved."

Yet, Holcomb never claimed that he possessed any information which had led him to believe that the Union had a history of forcing into arbitration all disputes arising from relatively minor contractual provisions. Nor was such evidence provided during any other aspect of the hearing, though Respondent did produce numerous collective-bargaining contracts between the Union and other employers.⁵ Costliness of arbitration is a reality which has been recognized by the Supreme Court in *Vaca v. Sipes*, 386 U.S. 171, 191-192 (1967). However, there is no evidence showing that the union possesses unlimited financial resources. Nor, given the judicially-recognized contemplation that each party to a dispute "will endeavor in good faith to settle grievances short of arbitration," *Id.* at 191, does it appear realistic, based upon the evidence adduced, to simply assume, without evidentiary support, that the union would likely be disposed to force into arbitration every

dispute arising from asserted noncompliance with a listed practice or standard.

In any event, Holcomb never explained why he had not reconsidered his purported "don't want an arbitrator to tell what we need" concern in light of the Union's June 11 revised proposal to exempt practices or standards from the arbitration phase of any contract's disputes resolution procedure. Seemingly, that revised proposal removed any concern about having to arbitrate such disputes. Yet, testifying approximately 9 months after that revised proposal had been made, Holcomb continued to complain about the possibility of having to arbitrate, and about being compelled by an arbitrator to do or not do something, in connection with a practices or standards list.

Concern about having to arbitrate every dispute, it should not escape notice, portrays a worst-possible scenario concerning the Union's proposed list of practices or standards—that every dispute will automatically lead to arbitration. Holcomb added other worst-case scenario concerns with respect to specific past practices. For example, in connection with the proposal that employees be allowed to continue purchasing postage stamps, a benefit which Holcomb conceded employees had been enjoying whenever stamps were available, he protested, "If we agree to that we would have to make sure that we had these provisions available." He did not explain why Respondent had not counterproposed amending that item, to add a qualification about not being obliged to carry stamps for whenever employees wanted them.

"Sometimes," admitted Holcomb, employees had been allowed access to the shop after hours to perform personal work, so long as they had prior supervisory permission. Yet, when addressing the proposal to "continue" that benefit, Holcomb protested, "there are certain things in the shop that we would not want people to relocate for them to come in and do personal work and I am not going to get into a guarantee that we can always let them do that." But, the proposal is to "continue" an existing practice, not to enlarge upon it. Nothing in that proposal, nor in what limited evidence there is concerning discussions of practices, even indicates that the Union was seeking allowance for employees to "always" have off-hours access to the facility. Furthermore, inasmuch as the practice had been existing without seeming need "to relocate" anything to accommodate off-hours work, that portion of Holcomb's protest seems patently groundless—at least absent some additional explanation, which never was forthcoming. And it should not escape notice that Respondent made no counterproposal which would qualify the occasions when employees would be allowed off-hours access.

Holcomb's worst-case scenarios attained an almost ridiculous level with respect to two other items. One, mentioned above, concerned perpetuation of the proposed practice of allowing employees to take their lunches and breaks wherever they desired to do so. Obviously, that is a broadly-worded proposal, though Respondent has adduced no evidence of any documented restriction on where within the Davenport facility employees had been allowed to take lunches and breaks. Putting the worst possible face on that vaguely-worded proposal, Holcomb complained about it, "I don't care to have people come in my office to take breaks and having [sic] lunch." And adding to such a worst-case scenario, by combining with it his purported concern about being told what to do by an arbitrator, Holcomb testified, "I would not want an arbi-

⁵ More Sturm and Drung over allowing Respondent to adduce evidence concerning contracts with other employers. But, in evaluating allegations of refusal to bargain in good faith, the Board has looked to contracts with employers other than the Respondent. See, e.g., *Reichhold Chemicals*, 288 NLRB 69, 71 (1988).

trator to determine whether or not they could eat in my office or another one of my manager's offices." Respondent has adduced no evidence that such a fear is realistic, either in connection with arbitrations conducted under the Union's other collective-bargaining contracts, nor in connection with arbitration awards elsewhere in the Quad Cities geographic area.

A second proposed practice-perpetuation concerned allowing employees to take time off, without pay or discipline, for personal appointments. At first blush, that proposal seems somewhat excessive. But, Holcomb admitted that it had been Respondent's practice to permit employees to take off work for appointments. He advanced no restriction which Respondent had imposed in connection with granting such permission. Yet, in addressing the Union's proposal to continue that practice, Holcomb protested, "To me, if a person has an appointment they could have an appointment every day and never show up for work according to this, plus I would not want an arbitrator to have to determine what days those are." Of course, if an employee failed to show up for work every day, that employee would not receive any wages under the Union's proposal. Beyond that, Respondent made no counterproposal to limit such time off, at least not so far as the record discloses. It just rejected that proposal, as well as almost all other proposals concerning continuance of specified practices.

True, some of the enumerated practices on the Union's one-and-a-quarter-page standards list are expressed vaguely. Others do not state with exactitude existing practices. But, the remedy for those problems is to question the vaguely-stated practices and to counterpropose the others with greater exactitude. There is no evidence that Respondent took either course. Still, it never contended that it had rejected all of the items on the list because a few were worded vaguely and others were not exact recitations of existing practices. Instead, it simply maintained its own proposals to eliminate all practices and to confine employment terms to those expressed in any contract reached by the parties.

When asked about his objections to the proposed continuation of the practice of providing employees with "supplies needed for the job," Holcomb added a different objection to the worst-case scenarios which he lodged in connection with others: "I feel myself and my management people know best what is required." He repeated that refrain in the process of objecting to the proposal that Respondent continue supplying, "Notebooks, pens, pencils, tape, staples, computers and headsets": "We, the management, know what is needed and headsets and office supplies." Later, asked about proposed continuance of providing "pagers and two-way communication radio" for employees to whom those items had been furnished, Holcomb objected, "First of all, that is operations, necessity for running operations and that should be a management decision on who should have radios and who should be furnished radios," as well as the mantra-like objection to allowing "an arbitrator to decide[] who would be using them."

Proposed reductions in benefits

One benefit which Respondent proposed be reduced, but not altogether eliminated, involved employees' vacations. Existing vacation practice for "full-time employees," prior to the representation election, had been based upon "length of employment." During the first calendar year of employment an employee earned 4 hours vacation credit for each continuous month employed, to a

maximum of 40 hours. During the second calendar year of continuous employment the employee continued earning 4 hours vacation credit to a maximum of 40 hours or, alternatively, up to 80 hours of accumulated first and second year months of employment.

Employees who completed 15 years of continuous employment prior to any June 30 received 120 hours of vacation pay; those who completed 20 years of continuous employment prior to any June 30 received 160 hours of vacation pay. Restrictions existed: vacation had to be requested and could be "authorized on a first come-first approved basis," consistent with adequate staffing; vacations had to be used in no less than eight-hour units except for employees with "an odd 4 hours to use in their second or third calendar year of employment" which "must be used in the year it is available," with no carry over into the following year.

The Union's initial proposal was for a 1-week vacation after 1 year of employment, 2 weeks for employees who worked 2 years, 3 weeks for those employed 7 years, and 4 weeks for those who had worked 15 years. Eligible to receive vacation would be any employee who worked 60 percent or more of total working days "during any twelve (12) month period," with pro rata vacations to be awarded to employees who did not achieve that 60-percent threshold.

The Union's initial proposal included additional vacation features: for time lost due to illness or injury; for separation from employment during a year; for splitting vacations; for scheduling "with due regard to the desire, seniority, and preference of the employee, consistent with the efficient operation of [Respondent's] business"; for "reasonable notice" not less than one-week before the anticipated vacation; for holidays falling within a vacation period; for the effects on vacations of layoff; and, for when vacations must be taken, with prohibition on payment to an employee in lieu of vacation "except by mutual agreement between the Union and" Respondent.

No question, that initial proposal made significant changes and additions, to the unit employees' benefit, to vacation policy as it had existed. Respondent replied in kind, but in the opposite direction. Its initial counterproposal reduced allowable vacations to 1 week's vacation for 1 year's service, 2 weeks for 5 years' employment, and 3 weeks for 15 years of continuous service. No provision was made for, in effect, 4 weeks of vacation for 20 years continuous employment. Pro rata vacations would no longer be allowed. An employee "must have worked 1,900 hours during his anniversary year to be eligible," with that calculation to be made on the basis of "consecutive years of service" beginning "with the last day of hire." As with the Union's initial proposal, Respondent's initial counterproposal contained additional, though less numerous, restrictions and qualifications on when vacations may be requested and taken. Holcomb acknowledged that the initial counterproposal contained reduced vacation benefits for unit employees.

During the May 22 negotiating session the parties discussed their vacation differences, as well as the difference between existing vacation policy and Respondent's counterproposal. The Union abandoned its demand for a fourth week of vacation after 15 years of employment. But, it held out for a third vacation week after 10 years' employment, as opposed to the 15-year eligibility requirement under Respondent's existing vacation policy. Re-

spondent verbally advanced changes in its initial counterproposal. It did not explain why it had chosen to make revision at that point in negotiations. There is no evidence that the revisions had been made as some sort of trade-off for union-concessions in some other area(s).

Those changes, and perhaps others as well, were embodied in a May 30 revised counterproposal. Essentially, that counterproposal restated existing vacation policy, with a fourth vacation-week included after 20 years of continuous service. Still, the Union continued holding out for a third vacation week after ten years of employment. It continued to do so through the November 26 negotiating session, but during that session the Union agreed to all other aspects of the May 30 revised counterproposal. Then, during the December 23 negotiating session the Union did agree that eligibility for a third vacation-week would not occur until 15 years of continuous employment. As a result, full agreement was reached on that date to what had essentially been Respondent's existing vacation policy.

Reductions also were counterproposed with respect to existing holiday policy. Prior to certification, "full-time employees" received eight paid holidays: New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and the next day, and Christmas Day, as well as the day before or after it. An employee was paid "eight hours or less as the employee may be scheduled to work" on a holiday. With prior authorization of a departmental manager, an employee was allowed to "use vacation time to supplement holiday time."

In its initial proposal, the Union added four more paid holidays: Martin Luther King Day, New Year's Eve, the employee's birthday, and a floating holiday, "even when not worked and regardless of the day of the week on which the holiday falls," with the employee to be granted an additional vacation day or paid day whenever a holiday falls during an employee's vacation. Qualifications were proposed for an employee to be eligible for vacation pay ("must work either with" the 15-day period before or after the holiday, unless ill or injured, or unless agreement by Respondent to the absence), as were provisions for the floating holiday and the birthday holiday. An employee obliged to work on a holiday was to receive double-time pay, with 4 hours guaranteed pay if work started on a holiday.

Respondent initially counterproposed its existing holiday policy, with two changes. One was to reduce the number of paid holidays from a total of eight to a total of six. Eliminated were the day after Thanksgiving Day and the day before or after Christmas Day. The second change is discussed in the succeeding subsection.

Seemingly early in the negotiations, and definitely by May 20, Respondent restored the two paid holidays omitted in its initial counterproposal. As with many of its other restorations of benefits, as negotiations had progressed, Respondent advanced no explanation for its decision to restore those two paid holidays and, independently, there is no evidence showing that had been done as a quid pro quo for some concession elsewhere by the Union.

Proposed increases in requirements and costs

The second holiday change in Respondent's initial counterproposal pertained to qualification for receiving a paid holiday. Under Respondent's existing holiday policy, at least so far as the

evidence discloses, there was no requirement that "full-time employees" be on the payroll for any minimum period to be eligible for a paid holiday. Such a requirement was added in the initial counterproposal. To receive holiday pay, it stated, an employee must complete "365 work days of employment"—that is, more than a calendar year of continuous employment—and, in addition, must work the work days prior to and after that holiday.

At the negotiating session of May 20, Respondent agreed to drop the 365-day initial eligibility requirement, in return for the Union's agreement to the workday-before-and-after eligibility requirement. Thus, the ultimate holiday-pay agreement resulted in imposition of a requirement to which, so far as the record reveals, unit employees had not been subjected before the certification.

A similar added requirement was imposed with regard to vacations. So far as the evidence shows, historically vacation pay for full-time employees had been based upon "their length of employment." As set forth in the preceding subsection, newly hired employees would "earn 4 hours of vacation pay for each full month of continuous employment during [his/her] first calendar year worked," to a maximum of 40 hours, which could then be used for paid vacation during the following year. Thereafter, hourly vacation credits were earned in succeeding months of each year of continuous employment.

Respondent initially counterproposed that vacation eligibility be based upon "consecutive years of service with" Respondent, "begin[ning] with the last day of hire." However, it continued, only after employment for 1 year would a newly hired employee be eligible for a 1-week vacation, to be taken during the succeeding anniversary year. Thus, for example, an employee hired during October could not take a vacation until after his/her following October anniversary date, whereas previously that employee could have taken a vacation any time during the next calendar year, based upon hourly vacation credits earned from October through December of the year of hire. The initial counterproposal also prohibited "pro rata vacations" and imposed the above-quoted new requirement that "to be eligible for a vacation employees must have worked 1,900 hours during his anniversary year." As described in the preceding subsection, as of May 22 Respondent, for whatever reason not disclosed by the record, had decided to revise that counterproposal, by restoring vacation-requirements to what had existed historically.

As to health benefits, prior to the Union's certification, policy had been for single employees to pay \$35, with Respondent paying \$90.58 a month for health coverage. For family coverage, an employee paid \$55, and Respondent paid \$282.82 per month. The Union initially proposed that Respondent begin contributing to the Central States Southeast and Southwest Health and Welfare Fund. That proposal contemplated substitution of \$25,000 death benefit, in place of the existing \$7500 one. It also would oblige Respondent to pay \$132 per month for each full-time and regular part-time unit employee, though only after that employee had been on the payroll for 30 days. Additional proposals pertained to employees absent due to illness or off-the-job injury, employees injured on the job, and employees who had been granted leaves of absence.

Respondent initially counterproposed continued participation, at the employee's choice, in the existing program. However, it also counterproposed that it and the employees each pay half of

the monthly premiums for health coverage. Thus, unit employees' costs for family coverage would increase rather dramatically and, to a lesser degree, so also would the cost for individual coverage.

During negotiations, Respondent legitimately objected that participating in the Central States Fund would increase its health insurance costs. The Union conceded as much. But, it objected, also legitimately, to increased costs which unit employees would be obliged to absorb under the initial counterproposal. During the May 22 negotiating session the Union agreed to continued unit employees' participation in Respondent's plan, in return for Respondent's agreement that no more than the amounts paid by other hourly-paid participants would be required of unit employees.

It is uncontroverted that overtime work had not been mandatory prior to the Union's certification. In its initial counterproposal Respondent advanced a change in that existing practice: "Employees shall be required to work overtime in order to meet the production requirements of the Employer." The Union objected to such a change in practice. It continued to do so for duration of the negotiations, including during the session of December 23. In turn, Respondent adhered to its initial counterproposal. Although Holcomb attempted to explain the reason for that adherence, his explanations were not always consistent.

Asked why Respondent had regarded mandatory overtime to be an important counterproposal, Holcomb initially answered, "[f]or the same reason" as Respondent had proposed eliminations and reductions in other areas: the above-quoted "starting point of negotiations." Almost immediately thereafter, however, he departed from that strategy-related reason, by adding a business-related reason: "It is because we are a service organization and when our customers say jump, we jump." Yet, the inherent logic of that latter explanation diminishes in the face of Respondent's policy prior to election of the Union as the unit employees' bargaining agent.

As pointed out above, Respondent had not been requiring its employees to accept overtime work. There is no evidence whatsoever that customer demands prior to the representation election had been any less than could be fairly anticipated by Respondent after that election. That is, there is no evidence that, as negotiations commenced, Respondent had anticipated increases in customers' demands, nor more insistent demands by customers for better service than had previously been the fact. Thus, to the extent that Holcomb's business-related reason is not inconsistent with his strategy-related reason for counterproposing mandatory overtime, there is no basis in the record for concluding that the asserted business-related reason had been based on the reality of Respondent's operations as they existed when negotiations commenced and as those negotiations progressed. That reality had not required mandatory overtime prior to certification of the Union.

Proposals affecting ability of the Union to fulfill its statutory role

The amended consolidated complaint identifies three areas—management rights, wages, seniority—in which Respondent's counterproposals allegedly undermined the Union's role as a statutory bargaining representative and, also, the ongoing statutory process of collective bargaining which arose following the Union's certification. By way of overview, there is no dispute that Respondent counterproposed a broad management right provision;

insisted that wages be negotiated on a unit employee-by-unit employee basis and that it retain discretion to determine wage increases, subject only to prior notification to the Union about them and to the Union's right to strike if it could not agree to particular increases; and, refused to include any seniority provision in any contract executed by the parties.

As will be seen, Holcomb had a consistently-asserted basis for the above-enumerated positions: Respondent had the unfettered right to make those determinations before the Union's election and certification and did not want to compromise ongoing unfettered control over determinations encompassed by those bargaining positions. Thus, he testified, "I wanted management rights to stay basically what we had in the past years. It had been effective. It has—and I didn't see any reason for change," and, "I feel that we have the best knowledge of what people are doing, how well they do it and can make that decision better being closer than an arbitrator."

With respect to management rights, in its initial proposal the Union included the following provision:

Except as limited by the intent and language of this Agreement, the Union recognizes the Employer's sole and exclusive right to make all decisions essential to the conduct of the business including, but not limited to, the right to direct the working forces; the right to determine the type and number of products to be distributed and remanufactured; the right to hire, promote, discipline, or discharge for just cause; and all other prerogatives and responsibilities normally inherent in management, provided the same are not contrary to any intent and/or language of this Agreement.

The Employer construes and the Union recognizes the provisions of this Agreement as constituting limitations and being the only limitation upon the Employer's right to manage its business.

By way of understanding the ensuing negotiations about management rights, one other subject must be understood.

As quoted above, the Union's initial management-rights proposal modifies Respondent's "right to hire, promote, discipline, or discharge" with the phrase "for just cause." In addition, the Union initially proposed that Respondent "will not discipline an employee without just cause" and, as well, detailed provisions concerning grounds for discharge without prior warning, a progressive disciplinary procedure for other infractions, and a procedure whereby an employee could "appeal any disciplinary action," which culminated in submission to "the grievance and arbitration provisions of this Agreement." As will be seen, one major unresolved sticking point during the negotiations became the "just cause" phrase.

From the outset Respondent opposed that phrase's inclusion in any contract. It adhered to that opposition throughout the ensuing negotiations and, it is fair to say, that opposition and the Union's insistence on the phrase's inclusion became a significant reason why no agreement ever was reached. The reason for Respondent's opposition to "just cause" corresponded with Holcomb's above-quoted explanations. Thus, when "just cause" was raised for discussion during the June 11 negotiating session, it is uncontroverted that, as Bruske testified, Respondent asserted that it thought it "was fair in discipline, that [it] had [its] inherent right

before to discipline however [it] wanted to,” and “wanted to continue to have that inherent right.” As of the last negotiating session on December 23, Respondent continued to refuse to agree to inclusion of any “just cause” provision.

As to its own management rights counterproposal, Respondent initially submitted a provision that, in pertinent part, recited:

Section 1: Except as expressly modified by a specific provision of this agreement, the Employer reserves and retains solely and exclusively all of its inherent rights to manage the business as such rights existed prior to the execution of any agreement with the Union.

Section 2: It is expressly recognized that the Employer shall have the exclusive right to determine partial or permanent discontinuance of operations or partial or complete shutdown or transfer of operations.

Section 3: The Union agrees and acknowledges that the Employer has the exclusive right, using its sole discretion, to hire, discharge, discipline, lay off, rehire, promote, demote, select for vacancy or layoff, to create or expand job classifications and to modify or discontinue existing job classifications; to determine and change the size and make up of the workforce; to determine, establish and change job duties, standards and requirements; to establish, or from time to time change rules to promote safety, efficiency, order and protection of Employer property and operations; to establish and change quality standards and workmanship required, to establish and change hours of work; to halt work stoppages, and to take effective action against slowdowns; to discontinue, transfer, relocate, subcontract or assign all or any part of its business operations; to expand, reduce, alter, combine, transfer, assign to or cease any job, job group, department or operation; to control and regulate or discontinue the use of supplies, machinery, equipment, vehicles, and other property owned, used, possessed or leased by the Employer.

The listing of specific management rights in this Article is not intended to be or shall it be considered restriction of or a waiver of any of the rights of the Employer not listed and not specifically surrendered by a specific provision of this Agreement whether or not such rights have been exercised in the past.

Respondent’s reasons for this specific counterproposal were two-fold.

First, as quoted above and as will be quoted further below, Holcomb had no desire to relinquish any of Respondent’s pre-existing discretion over any aspect of operations. Second, he was aware, when Respondent’s counterproposals were formulated, that the Union had agreed to an almost identical management rights provision in its collective-bargaining contract with Serv-A-Lite Products, Inc. Moreover, he was aware that the Union had once executed a contract with Logistics Support Group which did not contain a “just cause” provision. Of course, there is nothing inherently wrong under the Act with formulating bargaining positions on the basis of contracts reached elsewhere. Nor is there anything inherently wrong with a party—employer or labor organization—negotiating with an eye to reaching a contract which contains provisions which exist elsewhere. After all, such conduct is the basis of concepts such as area standards and most-favored nations.

Over the course of negotiations discussion took place about both of those contracts. The Logistics Support one had terminated before negotiations began between Respondent and the Union. During those negotiations Respondent pointed to the absence of a “just cause” provision in Logistics Support’s expired contract. The Union responded that its absence had caused the Union to incur substantial litigation costs. Those were incurred because the Union had attempted to submit an employee’s discharge to contractual disputes resolution procedures, most particularly arbitration. But, that effort had been rebuffed by the absence of a “just cause” restriction on Logistics Support’s contractual power of discharge. Based upon its absence, ultimately it was determined that Logistics Support was not contractually obligated to submit the discharge to arbitration. As a result, Respondent was told, the Union had decided to never again agree upon a contract which did not contain some form of “just cause” provision.

Discussion of the Serv-A-Lite contract’s almost identical management right provision is somewhat illuminating in evaluating Respondent’s general attitude. The portion of that contract’s management rights provision which leaves it only “almost identical” is its inclusion of a “just cause” restriction for personnel decisions. The Union pointed that out to Respondent, during the negotiations with it. Uncontradicted was Bruske’s testimony about Respondent’s retort, made during the May 1 negotiating session: that Respondent had not said that it “wanted the whole management rights parts” of Serv-A-Lite’s provision, but only “the parts [it] want[s]. We don’t want a just cause. We just want the rest of it.”

For its part, the Union complained that, while it recognized Respondent had possessed all of those managerial rights which it was counterproposing prior to the representation election, the Union had become the certified bargaining agent which meant that it had certain resulting statutory rights under the Act. Beyond that, the Union argued that so broad a management-rights counterproposal would allow Respondent to erode the bargaining unit. It also would allow Respondent, the Union argued, to deal arbitrarily with unit employees and, in consequence, would leave the Union vulnerable to liability for failure to comply with its statutory duty of fair representation of all unit employees.

For the most part the parties pretty much remained hitched to their initial management rights proposal and counterproposal throughout the negotiations, though there was agreement on a revised alcohol and drug testing section which also had been included in Respondent’s initial counterproposal and, further, revision of that counterproposal’s above-mentioned section concerning performance of unit work by nonunit personnel.

When “just cause” was raised at the May 3 negotiating session, it is undisputed that Respondent asserted, as Bruske testified, “that it was [Respondent]’s inherent right prior to being union to discipline, discharge for whatever reason [it] want to in whatever manner [it] wanted to and [it] believed [it] still had that inherent right and [it] had no wish to give that up.” When management rights was raised for discussion during the May 20 negotiating session, the Union was told, according to Bruske’s uncontradicted testimony, “that it was [Respondent]’s inherent right to run the Company is [management] deemed [it] should run it, that [it was] offering good wages, increases and that that should be enough for the employees.” In the course of discussing “just cause” during

the July 7 negotiating session, Respondent argued, Bruske testified without contradiction, "if [it] thought an employee had a problem [it] would deal with them, with the employee" and did not want discipline or discharge to become subject to an arbitrator's decision.

Events during the June 11 negotiating session are particularly significant. When the subject of management rights was raised for discussion, undisputed is Bruske's testimony that the Union was told, "the management rights that we are offering you is the same management rights we offered you from day one. We haven't changed it. It is not going to change. That is our proposal. We reject yours." When the Union inquired why Respondent needed management rights that were so broad, Respondent retorted that it "thought that was what [Respondent] needed in order to protect [its] rights," according to Bruske's undenied testimony.

The Union offered to accept Respondent's management rights counterproposal if Respondent would agree to certain other language, such as a "successor's clause"—a euphemism for what, in reality, would be a relocation provision—to protect employees' jobs should Respondent move to another location. Respondent agreed that its counterproposal allowed it to move across the street, hire a new work force and terminate its contract with the Union, but promised "that wasn't [its] intention and that [the Union] just needed to trust" Respondent. If that truly was not Respondent's intention, replied the Union, why not include that promise in a collective-bargaining contract. No, answered Respondent: "If we move, we are not going to tell new employees we might hire or those transferring that they have got to be part of the Union," adding that at that point the employees could "go through the process of certifying like these people did and vote the [U]nion in again and then we may sit down and negotiate with them."

In the end, there was no agreement on management rights, nor on "just cause." By the end of the December 23 negotiating session the Union remained firm that it would not agree to any management-rights provision unaccompanied by some form of "just cause." Respondent remained firm that it would not agree to the latter and, moreover, did not intend to budge from the above-quoted management rights language which it had initially counterproposed.

As with management rights and "just cause," there is a relationship between the subjects of wages and seniority. The dispute over wages is a straightforward one. The Union proposed that wages and their increases during a contract's term be based upon job titles, with each job title being included in one of four groups: "Engine Rebuilder, Service/Shop, Field Service, Engine Machinist"; "Truck Driver, Shipping/Engine Test, Engine Teardown"; "Parts, Yard Equipment, Parts Warehouse, Parts Delivery, Tire Press/Hoses"; and, "Clerk, Receptionist." For each group a base "Apprentice" wage rate is listed, with progression in wage increases set forth, based upon months of service in the group, until the employee attains that group's ultimate "Journeyman" pay rate. Thus, seniority becomes the basic means for unit employees to achieve wage increases during the contract's term, although other factors were not excluded as a basis for denying a particular increase. Moreover, seniority was initially proposed by the Union, as a means of making other contractual determinations.

Respondent submitted an initial counterproposal which listed each employee by name and, opposite each name, listed a minimum wage for that employee. During the contract's term Respondent "may pay more than the minimum, but may not pay less." Respondent rejected any seniority provision. It also rejected any grouping of employee job titles and, in fact, rejected any listing of job classifications and departments.

The basis for rejecting the Union's initial proposals, as well as for advancing an employee-by-employee wage counterproposal, was explained by Holcomb. He testified that it was his personal view that wages should be established and changed only upon the basis of review of individual employee merit, consistent with Respondent's historically-followed procedure: "the 1st of July each year, we would—I would ask for recommendations from supervisors and managers throughout the organization of anticipated raises for each employee." After reviewing those recommendations, Holcomb testified, "I would sit down with the managers and discuss each raise individually to best determine what we would give to the employee," on the basis of such considerations as "performance on their job, how well they knew their job, their attendance record and whether they would come in late or on time for work," as well as "how long they have been in the job, or within the company."

No limit was placed on the number of factors he considered, claimed Holcomb, when determining each employee's individual wage increase and, he further claimed, "I could never figure" any formula or calculation for making those determinations. Furthermore, Holcomb testified that he would not agree to inclusion of a contractual provision for seniority, "Because I don't—we have never done it that way and feel that it takes out the judgment of managers of employees who are actually performing their work the best."

With respect to that subject of seniority, the Union initially proposed a seniority article which encompassed such matters as newly-hired employees, promotion and transfer, layoff and recall, and determination of employee-qualification to perform jobs, as well as, of course, wage increases. During the ensuing negotiations, the Union persisted in demanding inclusion of a seniority provision and Respondent persisted in rejecting that demand. Furthermore, each side remained fixed on its wage proposal. In that regard, it should not be overlooked that Respondent's counterproposal contained increases, in some instances substantial ones, for the individually-listed unit employees. Indeed, as quoted above, Respondent appeared to believe that those initial increases should be a sufficient reason not to agree to relinquish any of its preexisting management rights and not to agree that certain subjects would be encompassed by any contract's disputes resolution procedure.

For the April 23 negotiating session Respondent increased the wage rates that it was counterproposing. The Union revised downward its initially proposed wage rates at the May 1 negotiating session.

During the May 20 negotiating session Respondent presented a "THIRD WAGE PROPOSAL" For purposes of this proceeding, the truly interesting component of it, aside from its wage revisions, is that that proposal included a table of "minimum wage rate[s]" which would be paid to "employees hired after the date this agreement is signed." Separate "Hourly Rate of Pay" is set

out for each of 10 separate "Job Title[s]": mechanic, engine rebuilding, engine tear-down, tire press, parts person, parts delivery, warehouse, clerk, delivery driver, and yard person. Even so, Respondent continued to resist listing even job titles, as well as groups of job titles, in any contract for employees already working for it and, beyond initial hire pay rates, for employees who were hired during a contract's term and continued working long enough to be considered for increases.

During the June 11 negotiating session, Respondent further modified its wage counterproposal, adding that, "[d]uring the term of this agreement, if the Employer wishes to raise the pay of an employee, it shall first provide written notice of its intent to the Union." Bargaining about amounts would then ensue, if demanded by the Union. However, "if agreement is not reached concerning the amount of increase in pay, such dispute" would not be subject to the disputes resolution nor no-strike/no-lockout contractual provisions, "and the parties may take such economic action as is permitted by law."

By way of explanation, testified Bruske without contradiction, Respondent asserted that those modifications would "allow the Union to be involved in determine [sic] who got how much or [it] would have the right to strike." In addition, explained Respondent, union security would then be unnecessary: "[I]f the Union had the right to deny somebody a wage increase, that surely they would pay Union dues because if they didn't pay Union dues, they would assume the Union wouldn't approve their wage increase and, therefore, everybody would just pay dues voluntarily."

Thereafter the positions of the parties remained essentially the same until the December 23 negotiating session. During it, the Union revised its proposal to the extent of allowing Respondent to determine whether or not to grant raises, under the above-described group schedule initially proposed by the Union, so long as the factors upon which Respondent would rely for its determinations were ones set out in a collective-bargaining contract. Respondent rejected the latter aspect of that revised proposal—written factors as the "basis for wage rates"—but counterproposed acceptance of it with merely the language, "The employer shall have the right to grant wage increases," along with certain other provisions not here pertinent.

There was essentially a single reason for Respondent's position concerning wages: as set forth above, Holcomb always had made individual employee wage evaluations concerning raises and wanted no change in his exercise of unfettered discretion when making those determinations. His position was articulated repeatedly to the Union during negotiations. For example, during the April 23 session, it is uncontested that the Union was told, as Bruske testified, "that it was [Respondent's] inherent right to determine wages in the past, that they had took [sic] each individual, they had considered everything and they had determined what each individual should receive as an increase in wages," and wanted to continue doing so. Asked during the April 2 negotiating session for the basis of its employee-by-employee wage increase determinations, it is not disputed that Respondent responded that it "[H]ad looked at each individual and determined for whatever reason [it] wanted to determine how much [it] thought the increase should be and that is what the proposal is based on." When the subject again was raised during the June 11 negotiating session, the Union was told that Respondent was "giv-

ing big wages in the first contract—really big wages compared to most . . . and that the employees should be satisfied with big increases in wages for a first contract and not expect anything else."

When the component subject of job description and group-classification was raised during the April 23 negotiating session, no one disputed Bruske's testimony that the Union was told, "There was going to be no job descriptions or job titles," and that Respondent "would determine who did what work on a day-to-day basis." That message was repeated during the May 22 negotiating session when, Bruske testified without contradiction, the Union was told "there would be no classifications or descriptions," and "that it was an inherent right of [Respondent] to determine what the people would do when they come to work." So far as the evidence shows, that remained Respondent's position throughout the remaining negotiations.

Similarly firm was Respondent in its position concerning seniority. There is no dispute that it told the Union on April 2, as Bruske testified, "[T]here was going to be no seniority in the contract that [Respondent] agreed to," and, during the July 7 session, that Respondent "was not going to recognize seniority and there was not going to be a seniority article in the contract." Indeed, Respondent's position could not have been articulated more firmly than during the June 11 negotiating session when, Bruske testified without contradiction, Respondent asserted "[T]his Company will not sign a contract with seniority in it," after which it refused to discuss that subject any further.

On the other side, throughout negotiations the Union articulated its reasons for opposing employee-by-employee wage enumeration and unfettered discretion for Respondent to decide whether or not to grant increases and their amounts. It protested that such a procedure, as Bruske put it, "creates jealousies and discontent with the workers, and will destroy a bargaining unit," if employees perceive that they are being disadvantaged by lesser, perhaps no, increases while their bargaining agent has allowed Respondent complete discretion to grant increases in greater amounts to similarly situated coworkers. It protested that allowing such unlimited discretion could be a basis upon which disadvantaged employees could complain of failure by the Union to fairly represent all unit employees equally—complaints which could lead to legal proceedings. It also objected that such unfettered discretion would allow Respondent to discriminate in increases, granting lesser, perhaps no, increases to employees who supported the Union, while granting greater increases to employees not so supportive of the Union.

There has been no change in those positions regarding wages and seniority. As mentioned in section I, above, Respondent admitted in its answer that on June 29 it had granted wage increases to unit employees. That did not occur until Respondent had submitted a final counterproposal and had informed the Union of its intention to grant those increases. Still, the Union did not agree that they could be granted. Moreover, there is no evidence that Respondent implemented any other aspect of its final proposal. Thus, so far as the record discloses, the wage increases constituted a piecemeal implementation of its final proposal.

In light of the discussion in the following Section, one other counterproposal must be mentioned. In its initial counterproposal, Respondent included a provision which states, "Upon termination of this agreement, all benefits hereunder shall be terminated and

shall not survive the agreement.” Respondent did not explain its reason for that provision. It probably should not be difficult for anyone to ascertain that purpose. The provision remained on the table throughout the ensuing negotiations. At the November 23 negotiating session the Union agreed to its inclusion in a contract.

V. DISCUSSION

As set forth at the beginning of the preceding section, any analysis of negotiations and their progress, or lack of it, must be conducted within the confines of two restrictions. First, negotiations must be viewed in their totality, so that isolated events, proposals and counterproposals are not accorded undue weight, which is not truly reflective of the entirety of the process. Second, the substance of proposals and counterproposals may be scrutinized, but that scrutiny must not be conducted on the basis of whether a trier of fact or reviewer subjectively believes their terms to be desirable or sufficiently generous.

The Union’s initial proposal, if accepted, would have resulted in substantial improvement in the employment situation of unit employees. It hardly is surprising that Respondent would have resisted changes which were so extensive. But, Respondent did not merely resist those proposals. In significant respects, it counterproposed terms which took away substantial employment terms existing before the Union had been certified or imposed greater burdens on unit employees.

The initial counterproposal eliminated unit employees’ 40-hour weekly workweek guarantee, while obliging those employees for the first time to work overtime whenever directed by Respondent to do so. In addition, it eliminated overtime pay for work in excess of 8 hours a day; only work in excess of 40 hours during a workweek would provide a basis for overtime pay. The initial counterproposal also eliminated existing paid breaks and two paid holidays, reduced existing vacation benefits, and increased requirements for paid vacations and paid holidays. It eliminated altogether ability of unit employees to participate in Respondent’s profit-sharing program, while not accepting any alternative pension program, and proposed increasing substantially unit employees’ costs for health insurance. Finally, it eliminated altogether any guarantee that existing practices would be continued.

As pointed out in section IV, it is not inherently unlawful to propose concessions in existing benefits. Nonetheless, where an employer makes such proposed concessions—especially where, as here, that is done in so many areas—it is natural for unit employees to become apprehensive about being retaliated against for having exercised their statutory right to elect a bargaining agent. Employee-perception has been held a valid statutory consideration when evaluating whether or not violations of Section 8(a)(1) of the Act have been committed. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). There seems no reason to conclude that the Court would be any less disposed to take employee perceptions into account when evaluating counterproposed eliminations, reductions and increased burdens.

Obviously, an employer can eliminate any adverse conclusion, based upon concessionary counterproposals, by adducing evidence of “a legitimate business purpose,” *NLRB v. J. P. Stevens & Co.*, supra, for them. Here, Respondent has not argued, nor produced evidence showing, that it had some pressing financial need that obliged it to propose the above-enumerated counterproposals.

Nor has it argued, even, that granting the Union’s proposals would cause it to incur too great an expense. Instead, Holcomb advanced a somewhat different type of reason for them.

As quoted in section IV, he explained that those counterproposals had been intended as, in effect, bargaining chips: they were made with the intended objective of using their restoration in exchange for concessions by the Union in its own extensive initial proposals. Of course, viewed under the Act, such an explanation raises an inherent danger, in light of the above-mentioned employee-perception of possible retaliation for having elected a bargaining agent. Nonetheless, that election does not guarantee employees of increased employment benefits nor, even, of retention of all existing employment benefits.

So far as the record discloses, Respondent had never guaranteed its employees that all, or any, of those existing employment terms would be perpetuated indefinitely. Presented here is a bargaining situation for an initial collective-bargaining contract. During its term, Respondent would be obliged to perpetuate whatever employment terms were enumerated in such a contract. Beyond that, Respondent was entitled to stake out some ground for resisting the Union’s proposed improvements. In such circumstances, despite the danger that unit employees might perceive that the detrimental counterproposals were retaliatorily-motivated, it cannot be said that Respondent’s counterproposed eliminations, reductions and increased obligations, involving employment terms prior to certification, had been totally lacking in legitimate business purpose and so necessarily at odds with “intent to settle the differences and to arrive at agreement,” *NLRB v. Wonder State Mfg. Co.*, supra, that, without more, they inherently constituted evidence of unwillingness to bargain in good faith.

Before moving on, one proposal—elimination of existing practices—warrants added comment. Viewed from an objective perspective, the items on the Union’s page-and-a-quarter list may appear trivial, even viewed in their totality. But, relative trivialness of an employment-related subject or subjects is not a proper analytical consideration. For, regardless of their relative weight in the overall employment-scheme, the practices on the Union’s list did involve “issues that settle an aspect of the relationship between the employer and the employees.” (Citations omitted.) *Chemical & Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971). So long as an employment term “is an aspect of the relationship between [an employer] and its own employees,” *Ford Motor Co. v. NLRB*, 441 U.S. 488, 501 (1979), “[n]ational labor policy contemplates that areas of common dispute between employers and employees be funneled into collective bargaining.” *Id.* at 499.

Considering that the Union prepared its one-and-a-quarter page list from information provided by unit employees, it would be difficult to conclude that the list’s enumerated items were not matter of concern to at least some, if not all, of those employees. Certainly, there is no evidence that no unit employees had been uninterested in perpetuation of those listed practices. Given Respondent’s own “Entire Agreement” counterproposal, moreover, there is no basis for concluding that the Union had no legitimate reason for seeking to have those practices embodied in a collective-bargaining contract with Respondent. Indeed, throughout the negotiations, Respondent made plain that it would not regard itself

bound by any employment term not included in a collective-bargaining contract.

Turning to the second objective area for evaluating the substance of proposals and counterproposals—ones which are measured against the process contemplated by the Act and against the role which Congress has accorded under the Act to parties—Respondent's initial counterproposal included a broad management rights provision, no restriction on the extent of its authority over personnel decisions, and a wage provision which allowed it to exercise total discretion over wage increase determinations. Of course, the Board has held that "it is not unlawful for an employer to propose and bargain concerning a broad management-rights clause." (Footnote omitted.) *Commercial Candy Vending Division*, 294 NLRB 908, 909 (1989). Still, not to be overlooked is the inherent impact of Respondent's management right counterproposal, especially when considered in conjunction with the other counterproposals enumerated at the beginning of this paragraph.

Were all of those counterproposals to be accepted, the Union would be left with no role as a certified collective-bargaining representative in areas of greatest concern to employees it is supposed to be representing. For example, at this earlier stage of the overall bargaining process, it is no less logical to ask, than did the United States Court of Appeals for the District of Columbia, in connection with a later stage of the overall bargaining process, "Can one imagine employee's pay—in any industry—being described as a subject of a *management functions* clause?" *McClatchy Newspapers, Inc. v. NLRB*, supra, 131 F.3d at 1033. Yet, that is precisely the result which would occur under the provisions of Respondent's initial counterproposal, notwithstanding that wages were covered under a separate section.

Under that section, to be sure, the Union was accorded a role in bargaining about minimum wage for each unit employee. But, that role was confined to ad hoc wage determinations for each unit employee, without any standards, such as seniority, to guide determinations concerning relationships between minimum wages for similarly-situated employees. Beyond that, under its initial counterproposal Respondent was free to decide when and whether or not each unit employee would receive a wage increase during any contract's term, as well as the amounts of increases which it decided to grant, without "having fixed standards as well as fixed timing for considering raises," *Id.* at 1035 fn. 8, which would allow the union to meaningfully represent unit employees in connection with wage increases.

Beyond that, under the management rights counterproposal, the Union was foreclosed altogether from a meaningful bargaining-agent role with respect to personnel decisions: "discharge, discipline, lay off, rehire, promot[ion], demot[ion], select[ion] for vacancy or layoff." Respondent based that counterproposal on the one in the Union's contract with Serv-A-Lite. But, in its initial counterproposal, it deliberately omitted the "just cause" qualification contained in Serv-A-Lite's management provision. As a result, Respondent concedes, the Union would be foreclosed from any representative role in such personnel decisions which Respondent chose to make, effectively leaving unit employees unrepresented when such decisions were made.

It must not be overlooked that the totality of the management rights, "just cause," wages and their increases, and no-seniority counterproposals have statutory implications beyond merely the

immediate bargaining situation. As Bruske pointed out during negotiations, the Union is required to abide by a duty of fairly representing all unit employees. *Vaca v. Sipes*, supra. "The union, of course, had to represent all employees in the bargaining unit." *Danylchuk v. Des Moines Register & Tribune Co.*, 128 F.3d 653, 654 (8th Cir. 1997). That duty is not one confined merely to processing grievances, nor even merely to contract administration. It extends no less to contract formation. *Airline Pilots v. O'Neill*, 499 U.S. 65 (1991). A union "owes its members the same duty of fair representation during contract negotiations as it [does] in all other union activities." (Citation omitted.) *Young v. UAW-LETC*, 95 F.3d 992, 997 (10th Cir. 1996).

One aspect of that duty is that a union must not deal with its members in a fashion that is concluded to be "arbitrary"—"so far outside a wide range of reasonableness that it is wholly irrational or arbitrary." *Ibid.*, 499 U.S. at 78. Although the issue has never been litigated, so far as I can ascertain, given the statutory role contemplated for a certified bargaining representative, a union certainly leaves itself vulnerable to a conclusion of arbitrary action if it abandons the fields of wage and personnel decisions to the total discretion of an employer with whom that union executes a collective-bargaining contract. Certainly, it is difficult to square such an abandonment role with the obligations which the Act contemplates for certified representatives in the overall bargaining process and, beyond that, with the statutory obligation of labor organizations to fairly and fully represent all bargaining unit members. The fact is that, under its management rights and wage counterproposals, Respondent could freely discriminate against employees, on whatever basis, and the Union would be foreclosed altogether from any contractual recourse to prevent and remedy that discrimination.

In fact, it was essentially foreclosure of the Union from any participation in connection with those subjects that generated Respondent's management rights and wage counterproposals, as well as its objections to any "just cause" and seniority provisions. "I wanted management rights to stay basically what we had in past years," asserted Holcomb, and as to "just cause," he testified that Respondent's management has "the best knowledge of what people are doing, how well they do it and can make that decision better being closer than an arbitrator." Similarly, as to wages, Holcomb argued that Respondent's wage counterproposal, shorn of any objective standards, preserved "the judgment of managers of employees who are actually performing their work the best," and, further, that he "could never figure" any objective-factor formula for granting wage increases. Thus, Respondent's reasons for its counterproposals in this second objective area for evaluating proposals are quite different from the bargaining-chip argument that it advanced in connection with counterproposals in the first objective area of evaluation.

The reasons advanced by Holcomb in that second area, however, are more akin to "empty talk and . . . mere surface [m]otions," *NLRB v. Reed & Prince Mfg. Co.*, supra—to "shadow boxing" and to "surface bargaining," *Continental Insurance Co. v. NLRB*, supra—than to legitimately advanced business-related concerns. After all, as quoted in section IV, Holcomb did testify to some objective factors which he took into account when evaluating past wage increases: "performance on their job, how well they knew their job; their attendance record and whether they

would come in late or on time for work,” and “how long they have been in the job, or within the company.” In fact, that latter factor appears to be the very seniority criterium which Respondent was unwilling to include in a contract with the Union.

In reality, the counterproposal concerning wage increases, and to a lesser extent the aspect of management rights concerning personnel decisions, illustrate the concern with decollectivization which Chief Judge Edwards identified in his opinion in *NLRB v. McClatchy Newspapers, Inc.*, supra, 964 F.2d at 1173. Those counterproposals would allow Respondent to continue dealing with unit employees, under a contract with their bargaining agent, on an individual basis, to the detriment of the collective-bargaining process contemplated by the Act. Employees could be punished or rewarded without regard to standards applied to similarly situated unit or nonunit employees. Employees could receive wage increases while similarly situated coworkers were denied increases. Amounts of increases could vary even though employees involved were comparably situated. In short, under Respondent’s wage and management rights counterproposals, those employees and their elected and certified bargaining agent would “face[] a discretionary cloud.” *McClatchy Newspapers, Inc. v. NLRB*, supra, 131 F.3d at 1032.

Not to be overlooked in connection with an evaluation of Respondent’s initial counterproposal is its provision for excluding “hourly office personnel” from the definition of “employee” included in the bargaining unit. Respondent agreed that that provision would encompass all office clerical employees. Yet, it had been at Respondent’s insistence that that classification of employee had been included in the unit in which the representation election was to be conducted. There is no evidence that the duties of those employees had changed between execution of the election stipulation and submission of Respondent’s initial counterproposal. An abrupt reversal of position, so soon after the certification had issued, would naturally convey the message that Respondent was not altogether serious in its attitude toward the employees whom the Union represented and toward the overall statutory process of selection of a bargaining agent and bargaining with that agent. That is, so abrupt a reversal of position raises a natural suspicion about Respondent’s good faith.

So, also, does its counterproposal for termination of all contractual benefits upon termination of the contract. As a matter of law, with limited exceptions, “the collective bargaining agreement survives its expiration date for purposes of marking the status quo as to wages and working conditions,” which the employer is obliged to maintain “until the parties negotiate a new agreement or bargain in good faith to impasse.” *NLRB v. Carilli*, 648 F.2d 1206, 1212 (9th Cir. 1981). Accord: *Hinson v. NLRB*, 428 F.2d 133, 136–138 (8th Cir. 1980). A proposal to, in effect, waive that statutory obligation “deprive[s] the union of ‘purchase’ in pursuing future negotiations,” thereby disparaging it, *McClatchy Newspapers, Inc. v. NLRB*, supra, 131 F.3d at 1033, as well as disparaging the statutory process of collective-bargaining. For, such a proposal, no less than a refusal to honor the statutory obligation to preserve existing terms upon contract expiration, “amounts to a declaration . . . that not only the Union, but the process of collective bargaining itself may be dispensed with.” *NLRB v. General Electric Co.*, 418 F.2d 736, 748 (2d Cir. 1969), cert. denied 397 U.S. 965 (1970), rehearing denied 397 U.S. 1059 (1970).

Still, as pointed out at the beginning of section IV, evaluations of the course of bargaining must not be confined to the face of proposals and counterproposals. Also to be taken into account is the course of negotiations: the arguments made to support an employer’s own counterproposals and to oppose a union’s proposals, willingness to modify and trade-off initial proposals and counterproposals, openness of mind. As set forth in section IV, Holcomb did explain that he “probably wasn’t thinking good at all over anything” when Respondent had insisted on office clerical employees being included in the bargaining unit—that he had not taken into consideration the fact that “before [it was] union some things weren’t confidential that might” become so after certification issued. Yet, that explanation was not advanced convincingly and, as pointed out in section IV, it tends to be contradicted by the objective fact that, during the representation proceeding, Respondent had been represented by experienced and knowledgeable counsel. It simply did not seem likely that the consequences of including office clericals in the bargaining unit would not have been explained to Holcomb at the time he expressed his desire to include them in the bargaining unit.

Beyond that, “confidential employees” are specifically excluded from the certified bargaining unit. If all office clerical employees truly had “access to confidential business information,” *NLRB v. Hendricks County Rural Electric Membership Corp.*, supra, surely that specific exclusion would have accomplished their exclusion, without the need to fool around with the certified unit definition. Moreover, Respondent eventually agreed that only one of the office clericals—Shirley Grunder—truly was confidential. Any argument that that agreement demonstrates Respondent’s flexibility is an argument which founders on one fact. There is no basis for concluding that Respondent had been unaware, when it formulated its initial counterproposal, that office clerical employees other than Grunder truly did not qualify as confidential employees. Surely, if anyone knew what their duties were, that someone would be Respondent. Yet, it advanced a counterproposal for their exclusion from the unit and a supporting argument that, in fact, applied to only one of them. Rather than demonstrating flexibility, Respondent’s eventual acquiescence to exclusion of only Grunder partakes more of a party being caught with its paw in the cookie jar.

No greater confidence in Respondent’s seriousness toward bargaining is engendered by examination of its negotiating conduct in connection with the other above-covered subjects. To be sure, most of the first above-described category eliminations, reductions and increased obligations were eventually restored. Consistent with Holcomb’s “selling lift trucks” analogy, one would assume that those restorations would have resulted from trade-offs with improvements which the Union had initially proposed. In fact, that did occur on May 20 when Respondent agreed to drop its 365-days eligibility requirement for paid holidays, in return for the Union’s agreement to accept only eight paid holidays and to accept the counterproposal requiring work the day before and after a holiday to be eligible to be paid for that holiday. During the May 22 negotiating session, Respondent agreed that unit employees would pay no greater health insurance costs than its other hourly-paid employees, in return for the Union’s agreement to forego proposing that unit employees participate in the Central States program. But, those were the only restorations or partial restora-

tions which were shown to have been the result of actual trade-offs.

For the most part, Respondent made unexplained "concessions here and there," *NLRB v. Herman Sausage Co.*, supra, without any evidence of specific trade-offs for them. For example, Respondent revised its counterproposal to restore overtime pay after 8 hours of work, without any showing that the revision related to any concession by the Union in its initial proposal. Similarly, Respondent restored paid breaks for technicians for the May 22 negotiations and, when the Union continued to protest about the lack of contractual paid breaks for other unit employees, later extended paid breaks to other unit employees. But, there is no evidence that it took either step only after the Union had abandoned some proposal or had acquiesced in some other counterproposal. After the Union dropped its demand for a fourth paid vacation week after only 15 years, Respondent revised its initial counterproposal to restore most of the preexisting paid vacation policy. But, there is no particularized evidence that the latter had been in response to the former, nor to some concession by the Union in another area. In short, while Holcomb advanced an explanation for the first category of proposals—eliminations, reductions, obligations increases—there is no evidence that Respondent bargained consistently with that explanation in connection with those subjects. For the most part, instead, the evidence shows that it did no more than feed restorations into the bargaining process, here and there, without regard to what the Union was doing or not doing as negotiations progressed.

In fact, in two regards Respondent resisted any restorations whatsoever. Prior to certification unit employees had been guaranteed a 40-hours workweek and were not required to accept overtime work. In its initial counterproposal, Respondent eliminated the former and required the latter. There is no evidence that it was willing to consider any changes in those two counterproposals, as might be expected were it truly following a "selling lift trucks"—like approach in that category of subjects. Instead, Respondent obdurately insisted on inclusion of both counterproposals in any contract which it executed with the Union. Yet, its asserted business-related reason for that insistence are not consistent with the practice which Respondent had been following before the Union became the certified representative of the unit employees.

In both instances, Respondent pled customer-necessity. For the one, it argued that customers did not guarantee business to Respondent. Yet, that was the fact before the Union was certified. For the other, it argued that "when our customers say jump, we jump." Obviously, true. Yet, there is no basis for concluding that customer-demands had been any greater after than before the Union's certification. If Respondent was able to accommodate customer demands before then, there is no basis for concluding that it would be unable to continue doing so after certification, without unit employees being newly required to work overtime whenever demanded by Respondent. What is shown is that, taken collectively, those counterproposals left unit employees vulnerable to working less than 40 hours a week, perhaps as supervisors and nonunit employees performed their work, while the unit employees would be required to work overtime whenever directed to do so by Respondent. Yet, the only perceivable difference between Respondent's operations was the fact that the Union had been

certified as the unit employees' bargaining agent. In the circumstances, it would be fair for an employee to conclude that those counterproposals partook more of retaliatory penalty, than of genuine business need.

A like conclusion might be perceived from Respondent's counterproposal to eliminate all existing practices, though as it turns out that its approach in this area was more rooted in the rationale which motivated its management rights and wage proposals. The importance to employees of such practices, trivial though one might subjectively view them, under the Act is discussed above. Although Respondent criticized some items on the Union's page-and-a-quarter list as being vaguely-worded and as not being totally accurate recitations of some practices, it never denied that the list did recite practices being followed at the Davenport facility prior to the Union's certification. What Respondent did argue, with logic to support that argument, is that never before had it reduced those practices to a written guarantee of their continuation. As a result of the certification and its ensuing bargaining obligation, Respondent would become required to make such a commitment. Thus, it was hardly illogical for it to insist that the Union "put on the table" the practices that it sought to have Respondent perpetuate.

The logic of that position, however, diminishes when the bargaining about those practices is reviewed. Rather than specify vague or not completely accurate statements of certain practices, Respondent deprecated the Union's entire list as being "ridiculous," even though it had been Respondent who had insisted on "put[ting] on the table" practices which the Union wanted continued during a contract's term. Respondent also made the facially logical argument that it would be too costly to submit every dispute over those items to arbitration. Yet, as pointed out in section IV, Respondent has presented no evidence showing that such a concern had truly been genuine—had been other than the smoke of "conclusional statements," *John Ascuaga's Nugget*, supra. In fact, the Union's revised proposal to remove any standards or practices provision from the arbitration stage of any disputes resolution procedure would appear to remove Respondent's asserted objection. Nonetheless, Respondent continued to advance it as an objection to listing practices in any contract and, moreover, Holcomb continued doing so as late as when testifying in this proceeding.

Beyond that base objection to including standards and practices in any collective-bargaining contract, Holcomb advanced a series of particularized objections to specific items on the Union's page-and-a-quarter list. Yet, it is difficult to take any one of those particularized objections seriously, in light of the evidence concerning existence of those practices and in light of commonsense. How truly realistic is it to assume that some unit employee would seize upon the lunch and break practice and insist upon taking lunch in the vicepresident and general manager's office? And, concomitantly, how reasonable is it to assume than any arbitrator would conclude that a contractual right existed to do so? Moreover, inasmuch as employees had been allowed to perform some off-hours personal work at Respondent's facility, on what basis did relocations arise as a problem for no more than continuation of that admitted practice? Further, is it realistic to assume that perpetuation of the practice of allowing unit employees to take unpaid time off for personal reasons will lead to unit employees

taking every day off, in the process foregoing pay altogether? Or to contend that continuance of the stamp-purchase practice, whenever stamps are available, will somehow necessitate that Respondent undertake the expanded obligation of making special stamp purchases to satisfy employee-demands for them?

The “patent improbability,” *Queen Mary Restaurants Corp. v. NLRB*, supra, of those objections is, itself, some evidence that Respondent was not approaching negotiations about maintenance of standards or practices with an open mind and with sincerity of intent to make accommodations and modifications needed to reach agreement. In fact, Respondent made mostly no response to the Union’s proposal for continuance of practices other than to reject almost all aspects of that proposal and its related list. No seeming effort was made to make a more limited counterproposal. No seeming effort was made to suggest reduction in the number of practices, that would leave more acceptable the overall commitment about practices which the Union was seeking. In fact, no seeming effort was made to more narrowly describe the practices enumerated on the Union’s list. To be sure, Respondent was being asked for the first time to embody its practices in writing and to make a commitment to continue them for the duration of a contract. But, rather than attempt to accommodate that situation and try to reach a more limited agreement with the Union, Respondent did no more than deprecate the list and reject every one of its listed practices—not on grounds displaying genuine concern about having to continue particular practices, but rather on a basis removed by the Union during negotiations and on a variety of specious worst-case scenarios.

A conclusion that Respondent had entered negotiations with no intention of relinquishing any control over its employment relationship with employees, regardless of proposals or modified proposals which might be made by the Union, is fortified by its rigidity during negotiations concerning wages and their increases, and by the aspect of management rights involving personnel decisions, such as discharge, layoff, promotion, etc. Respondent was completely unwilling to budge from its initial management rights counterproposal. It refused to submit personnel-related decisions to contractual disputes resolution, especially to arbitration. It displayed no open-minded willingness to consider even the least restriction on what it asserted to be its “inherent right” to make personnel decisions, even to the limited extent of agreeing that there should be “just cause” for such decisions. It offered no compromise. It made no effort to trade-off some limitation on its authority over personnel-related decisions in return for the Union’s concession in that or some other area.

Indeed, Respondent’s total unwillingness to brook any compromise whatsoever in its management rights counterproposal’s language, as negotiations continued, was highlighted by what occurred when the Union pointed out that the counterproposal left the Union and the unit employees’ representation rights unprotected should Respondent decide to relocate operations. Respondent agreed that that was the fact. It disavowed any intention to take such a course. Yet, asked to embody that stated intention in writing, in a contract, Respondent flatly refused to modify its management rights provision even to that extent. It advanced no reason for that unwillingness. It merely asserted unwillingness and remained adamant in its refusal to make even so limited a modification.

Respondent remained no less rigid with regard to wages. Under its initial counterproposal, minimum wages would be set on an individual unit-employee basis. No standards were contemplated to guide comparability of minimum wages among comparably-situated employees. Nor would any such standards exist to guide comparable fairness of increases during a contract’s term. Instead, throughout negotiations, Respondent insisted single-mindedly that it intended to retain total control over wage-increase determinations—that its managers knew best and that no role in that process could be accorded to an arbitrator. Even though Holcomb enumerated some objective standards historically considered when evaluating whether or not to grant increases, Respondent was completely unwilling to agree to the least modification of its open-ended wage increase discretion—unwilling to include seniority or any other objective factor as even some, though not necessarily the only, bases for considering whether or not to grant mid-term wage increases to unit employees.

True, Respondent did make some seeming compromise in its “THIRD WAGE PROPOSAL.” But, that purported compromise was more apparent than real. In the first place, ongoing wage increase negotiations, over the term of a collective-bargaining contract, presents “transaction costs [which] might (or might not) make that infeasible.” *McClatchy Newspapers, Inc. v. NLRB*, supra, 131 F.3d at 1034. After all, though Respondent has followed a practice of determining and granting wage increases mid-calendar year, nothing in its counterproposals would oblige it to continue following that practice—to refrain from, instead, deciding to string-out wage increase determinations, unit-employee-by-unit-employee, throughout the calendar year. Certainly, its overall individual-unit-employee approach to wages naturally raises some suspicion, among employees and their bargaining agent, that Respondent might well resort to such a revision in practice.

Second, with no objective standards whatsoever—even limited ones which still would allow Respondent to exercise some subjective discretion in determining whether or not to grant particular wage increases—willingness to give notice of proposed increases, and to bargain before granting them, is hardly meaningful. Any bargaining would essentially consist of Respondent advancing its reasons and, where it disagreed, the Union protesting. The same factors could be emphasized to support an increase for one employee, while diminishing those same factors in connection with a decision to not grant an increase to a comparably-situated employee. The Union would be in no position to bargain meaningfully about what, after all, would be no more than Respondent’s statements about why it decided to grant or withhold a particular increase. In fact, absence of any objective standards whatsoever, not only decollectivizes the collective-bargaining process, but also inherently invites an employer to discriminate, in granting and withholding increases, against employees who more strongly support a bargaining agent, and in favor of unit employees who less strongly support, perhaps oppose, that bargaining agent. With respect to wage increases, Respondent’s firmly-held position is not meaningfully different than a management functions one.

In that connection, it should not escape notice that the “THIRD WAGE PROPOSAL” did provide for certain wage determinations to be made on the basis of job title—for employees newly hired during the term of a contract. Thereafter, however, possible wage increases for those employees, as well as for employees working

while that contract was being negotiated, would be made without any regard for job title. Yet, if job titles could be a basis for initial wage determinations, for newly hired employees, seemingly there would be no barrier to taking job titles into account, as one factor, when making wage increase determinations. And Holcomb advanced no explanation for why that would not be feasible.

Understand, I am not saying that Respondent had to agree to the Union's initially proposed wage-groupings and to its wholly seniority-determined system for periodic increases. To say that would be to indulge in subjective judgment which, as pointed out in section IV, is not allowed under the Act. Yet, as set out at the beginning of that section, evaluation of good or bad faith bargaining can take into account objective aspects of proposals and counterproposals, the explanations for them, and the willingness of parties to make efforts to strike compromises in connection with them, as well as the impact of those proposals and counterproposals on the Congressionally-mandated process of collective bargaining and on the representative role assigned to certified bargaining agent under the Act.

Respondent was not required to blindly accept the Union's initial proposal of job title-grouping for purposes of wage determinations. Nonetheless, doubt about the good faith of its own bargaining position inherently arises from its refusal to give even some weight to job titles when evaluating whether or not to grant wage increases, while at the same time being perfectly willing to utilize job titles to establish entry pay for employees hired during the term of a contract. The unexplained inconsistency cannot be disregarded when assessing Respondent's willingness to bargain in good faith.

Third, if "transaction costs" incident to bargaining about wage increases is of suspect feasibility, even less so is striking whenever no agreement is reached as a result of bargaining about one or a few proposed wage increases. Calling out on strike an entire bargaining unit is hardly an action to be taken cavalierly. Even less so is repeatedly striking every time increases are proposed during a contract's term, particularly were Respondent to begin stringing them out during the course of a calendar year. In that respect, note also should be taken of Respondent's ongoing complaints about the trivialness of including practices and standards in a collective-bargaining contract and of the possibility of allowing one or more of them to become a subject of arbitration. Seemingly, Respondent would regard it as no less trivial to dispute a nickel or dime an hour increase, or the lack of it, to a strike by the entire bargaining unit. Yet, it took inconsistent positions on the two subjects.

It also should not be overlooked that Respondent's strike-aspect of its "THIRD WAGE PROPOSAL" is not necessarily consistent with the objective sought by Congress. As Section 1 of the Act makes explicit, one of its objectives is to utilize collective-bargaining contracts as a means for minimizing, if not eliminating, disruptions to the free flow of commerce caused by labor disputes. Obviously, strikes are one such disruptions. Rather than accommodating that objective, Respondent's strike-alternative revised counterproposal contemplates the very type of conduct which is inherently disruptive of the free flow of commerce. And inasmuch as striking is a possibility every time a wage increase is conferred or denied, that aspect of the "THIRD WAGE PROPOSAL" presents the prospect of ongoing labor dispute and incident disruption. Of course, were one to conclude that the Un-

ion would not be likely to strike as a result of individual wage increase determinations, because it is not feasible to do so, then that aspect of Respondent's revised counterproposal is an empty one—and it did not seem that Respondent had overlooked that fact.

Of course, Respondent is hardly obliged to tailor its bargaining actions with an eye to promoting the statutory objectives of Congress. Even so, it is obliged to comply with "[v]arying practices in enforcing the Act," *H. K. Porter v. NLRB*, supra. Its attitude toward the Act and the obligations arising under it was revealed in connection with negotiations about that "THIRD WAGE PROPOSAL." It suggested that the Union utilize its willingness to bargain about wage increases as some type of lever to compel unit employees to pay union dues. Putting aside the fact that Iowa is a so-called "right to work" State, and the fact that represented employees are not required under the Act to become full union members, the fact is that Section 8(a)(3) of the Act provides the means whereby labor organizations can lawfully compel dues payments by "financial core" members. *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963). Discrimination in evaluating wage increases for represented employees is not contemplated by that statutory scheme. To the contrary, to discriminate against an employee who legitimately refuses to pay dues, much less become a full member of the Union, would constitute the very type of discriminatory conduct which gives rise to a breach of labor organizations' statutory duty of fair representation. Advancing an unlawful course of action to justify a counterproposal hardly displays the good faith which the Act requires.

Aside from its substantive positions and its lack of willingness to agree to compromises and modifications of them, at various points during the negotiations Respondent made statements which demonstrated its inflexibility concerning its counterproposals—demonstrated its unwillingness to negotiate "with an open and fair mind, and a sincere purpose to find a basis of agreement," *Globe Cotton Mills v. NLRB*, 103 F.2d 91, 94 (5th Cir. 1939), and "with an intent to settle the differences and to arrive at an agreement." *NLRB v. Wonder State Mfg. Co.*, supra. Thus, it is uncontroverted that it told the Union, in connection with seniority, "this Company will not sign a contract with seniority in it"; that breaks and telephone and restroom usage were "the way it was now and [Respondent] had no intent of changing anything"; that "the management rights that we are offering you is the same management rights we offered you from day one. We haven't change it. It is not going to change"; that "it was [Respondent's] inherent right prior to being union to discipline, discharge for whatever reason . . . and [Respondent] believed [it] still had that inherent right and . . . had no wish to give it up"; and, that "there would be no classifications or descriptions." Those phrases are hardly words expressing willingness to compromise or to settle differences. Rather, they are phrases of farewell, should the Union seek to negotiate any changes in Respondent's initial counterproposals concerning those subjects.

In the final analysis Respondent's overall approach to bargaining appears to have been one of rigid unwillingness to bargain meaningfully about what Holcomb asserted were management's "inherent rights" and that the Union should simply be willing to accept that state of affairs in return for initial wage increases. In fact, Respondent stated as much during the negotiations. Thus,

there is no dispute that it flatly told the Union during the May 20 negotiating session, "that [Respondent was] offering good wages, increases and that that should be enough for the employees." That cannot be regarded as some type of inadvertent or momentarily ill-considered remark. For, it is uncontested that the Union was told the same thing during the June 11 negotiating session: that Respondent "was giving big wages in the first contrac—really big wages compared to most . . . and that the employees should be satisfied with big increases in wages for a first contract and not expect anything else." Of course, Section 8(d) of the Act requires that bargaining be conducted for subjects other than merely "good wages" and "big increases."

The situation presented here is not so open and shut as the General Counsel portrays it to be. Viewed in isolation, many of the above-discussed factors would not, standing alone, support a conclusion of failure to bargain in good faith. Indeed, such a conclusion would not be supported by certain combinations of those factors. Nevertheless, the situation must be viewed in its entirety. Respondent entered negotiations with the admitted intention of not relinquishing any of the "inherent rights" of management—an intention not necessarily unlawful, but one that creates a natural tension with the statutorily-contemplated process of collective bargaining and, also with the representative function of a certified bargaining agent.

Respondent implemented that admitted intention through initial counterproposals regarding wages and personnel decisions—e.g., discharge and discipline, layoff and rehire, promotion and demotion—which shut out the Union almost entirely from fulfilling any representative role concerning those important mandatory bargaining subjects during a contract's term. Respondent adhered rigidly to those initial counterproposals, being unwilling to relent in any meaningful extent from them and being unwilling to be open-minded to compromise regarding their terms. To the small degree that it did counterpropose a revision of its initial wage counterproposal, it accompanied that revision with the suggestion that the Union utilize it in a manner which likely violates the Union's statutory duty of fair representation and which exceeds the statutorily-allowable method for enforcing financial obligations of bargaining unit members.

Nor was that the lone occasion when Respondent displayed a cavalier attitude toward the Act and "practices in enforcing" it. *H. K. Porter v. NLRB*, supra. It initially counterproposed revising the newly-certified bargaining unit to remove from representation an entire class of employees—office clerical employees—whose inclusion in the unit Respondent had sought originally. It did so on an asserted basis already covered by the certified unit's exclusions: "confidential employees". Although it did eventually relent from that initial counterproposal, it did so be effectively acknowledging that, in fact, only one office clerical employee is truly confidential—by acknowledging that there was no basis for broadly-based counterproposal for removal off all office clerical employees from the certified bargaining unit. Not only does its bargaining conduct in that respect call into question the sincerity of Respondent's initial unit-revision counterproposal, but also the sincerity of originally insisting that office clerical employees be included in the unit.

Another initial counterproposal which creates tension with practices under the Act was the one which terminated all contrac-

tual benefits upon termination of a collective-bargaining contract in which they are enumerated—in effect, counterproposing waiver of a statutory right of unit employees and disparaging both the certified bargaining agent and, as well, the very process of collective bargaining, as was true of its wage and personnel-decision counterproposals. And, as with the latter counterproposals, Respondent rigidly adhered to that waiver counterproposal, concerning termination of contractual benefits, throughout the negotiations.

Indeed, those were not the sole subjects with which Respondent displayed no disposition to make modifications to reach agreement on terms for a collective-bargaining contract. It initially counterproposed several eliminations and reductions of existing benefits, as well as increases in existing obligations of unit employees. Its claim that those counterproposals were intended to, in effect, create room for bargaining tends to be refuted by what happened in connection with them. Respondent actually traded off restorations during negotiations of but a few of them. Others it added back for no seeming particular reason other than to calculatedly "make concessions here and there," *NLRB v. Herman Sausage Co.*, supra, thereby apparently attempting to disguise, if not conceal altogether, the "shadow boxing" overall negotiating strategy which it was pursuing.

Contrary to Holcomb's purported "starting point" assertion, moreover, some of the eliminations and one obligation-increase never were restored during bargaining. To the contrary, Respondent obdurately adhered to its initial mandatory overtime counterproposal. It also rigidly adhered to elimination of the existing 40-hour workweek guarantee, agreeing only that it would not hire anyone for the specific purpose of replacing work of unit employees, but retaining the option to assign supervisors and regularly employed nonunit employees to perform work that unit employees could be performing. Both with respect to mandatory overtime and elimination of the 40-hour workweek guarantee, Respondent advanced for those counterproposals explanations at obvious odds with practice before certification and, consequently, ones which were inherently specious in appearance.

Indeed, Respondent was not loathe to advance bargaining positions which did not withstand scrutiny and which were seemingly specious. It repeatedly did that when resisting recitation in a contract of any existing practices or standards which union employees, through their bargaining agent, had sought to preserve. Even when the Union revised its initial proposal to address the most recurrent of Respondent's objections—removal of contractually-listed practices or standards from coverage of arbitration under the contractual disputes resolution procedure—Respondent simply ignored that proposed revision and continued to object to arbitration of such purported trivial matters. It continued to object to listing practices or standards in a contract, while continuing to insist that it would regard itself as bound only to perpetuate those terms and conditions which were enumerated in a collective-bargaining contract.

In the final analysis, Respondent admitted that its overall bargaining strategy was based not upon its view that employees should be satisfied with "big [wage] increases for a first contract" and were not entitled to expect "anything else," thereby leaving Respondent free to continue exercising complete discretion over other terms and conditions of employment, regardless of the statu-

torily-contemplated representative role of a certified bargaining agent and the policies of the Act concerning obligations once certification has issued. In view of the totality of these considerations, as well as of the other circumstances and considerations reviewed in this and in the preceding Sections, I conclude that a preponderance of the credible evidence establishes that Respondent did not bargain in good faith with the Union, from the outset. That is, it engaged in take it or leave it bargaining with no meaningful effort being made to accommodate differences with respect to statutorily-important subjects and to reach a final contract on terms other than those predetermined by Respondent. Therefore, I conclude that Respondent did not bargain in good faith with the Union and, in consequence, that it violated Section 8(a)(5) and (1) of the Act. From that follow two additional conclusions.

First, there is no basis for concluding that the June wage increases had been based upon a valid impasse. Regardless of past practice, “unilateral change in conditions of employment under negotiation” violate Section 8(a)(5) of the Act. *NLRB v. Katz*, supra, 369 U.S. at 743. “Where, as here, the parties are engaged in negotiations for a collective-bargaining agreement, an employer has the obligation to refrain from making unilateral changes in unit employees’ terms and conditions of employment unless and until the parties have reached an overall impasse on bargaining for the agreement as a whole.” (Citation omitted.) *Monroe Mfg.*, 323 NLRB 24, 24 (1977). See also *North Star Steel Co. v. NLRB*, 974 F.2d 68, (8th Cir. 1992). Therefore, Respondent’s June wage increases, apparently not actually realized by employees until July, violated Section 8(a)(5) and (1) of the Act.

Secondly, the Union was certified on December 2, 1996. As concluded above, from the outset Respondent has failed and refused to bargain in good faith with it. Therefore, the certification year will be ordered extended for another year to ensure that unit employees will receive the benefits of bargaining to which the Act entitles them. See *Day & Zimmerman Services*, 325 NLRB 1046 (1998). See also *NLRB v. Americare-New Lexington Health Care*, 124 F.3d 753, 759–760 (6th Cir. 1997), and *Bryant & Stratton Business Institute, v. NLRB*, 140 F.3d 169, 184–185 (2d Cir. 1998).

CONCLUSIONS OF LAW

Altorfer Machinery Company, Lift Truck Division has committed unfair labor practices affecting commerce by failing and refusing to bargain in good faith with Teamsters Local Union No. 371, affiliated with the International Brotherhood of Teamsters, AFL–CIO—as the certified exclusive collective-bargaining representative of employees in an appropriate bargaining unit of all full-time and regular part-time hourly employees employed at Altorfer Machinery Company, Lift Truck Division’s facility located at 3888 West River Drive, Davenport, Iowa; but excluding all other employees, including but not limited to sales employees, confidential employees, guards and supervisors as defined in the Act—and by changing wage rates of employees in that appropriate bargaining unit during bargaining and at a time when no legitimate impasse existed, in violation of Section 8(a)(5) and (1) of the Act; and by prohibiting employees from communicating with each other only about the above-named labor organization work time and while on company property, by threatening discharge and other discipline against employees caught violating that prohibi-

tion, and by discharging striker Jimmy Sprout and by suspending striker David Wells for engaging in purported strike misconduct in which neither of them did, in fact, engage, in violation of Section 8(a)(1) of the Act. However, no violation of Section 8(a)(3) of the Act will be considered and that allegation shall be dismissed.

REMEDY

Having concluded that Altorfer Machinery Company, Lift Truck Division has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative actions to effectuate the policies of the Act. With respect to the latter, it shall be ordered to bargain in good faith with Teamsters Local Union No. 371, affiliated with the International Brotherhood of Teamsters, AFL–CIO—as the exclusive collective-bargaining representative of employees in the appropriate bargaining unit of all full time and regular part-time hourly employees employed at Altorfer Machinery Company, Lift Truck Division’s facility located at 3888 West River Drive, Davenport, Iowa; but excluding all other employees, including but not limited to sales employees, confidential employees, guards and supervisors as defined in the Act—on terms and conditions of employment and, if an understanding is reached, embody it in a signed agreement. However, nothing in this Order shall be construed as authorizing any recession or change in the mid-1997 wage increases granted to employees in that appropriate bargaining unit. Moreover, the certification year shall extend from one year from the date that good-faith bargaining begins.

It shall also be ordered to, within 14 days from the date of this Order, offer Jimmy Sprout reinstatement to the position of engine rebuilder he held prior to his discharge, dismissing, if necessary, anyone who subsequently may have been hired or assigned to that job. If that job no longer exists, Sprout will be offered employment in a substantially equivalent job, without prejudice to seniority or other rights and privileges which he would have enjoyed had he not been unlawfully discharged. Further, it shall be ordered to make whole Sprout for any loss of earnings and other benefits suffered as a result of that unlawful discharge and, also, to make whole David Wells for any loss of earnings and other benefits suffered as a result of the latter’s unlawful 30-day suspension. Backpay in each instance shall be computed on a quarterly basis, making deduction for interim earnings, *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest to be paid on amounts owing, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). It shall also be ordered to, within 14 days from the date of this Order, remove from its files all references to the unlawful discharge of Jimmy Sprout and to the unlawful suspension of David Wells. Within 3 days thereafter, it shall notify each one in writing that this has been done and that those unlawful acts shall not be used against them in any way.

On the foregoing findings of fact and conclusions of law, and based upon the entire record, I issue the following recommended⁶

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

Respondent, Altorfer Machinery Division, Lift Truck Division, Davenport, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting employees from communicating with each other about Teamsters Local Union No. 371, affiliated with the International Brotherhood of Teamsters, AFL-CIO during company time or while on company premises, and threatening to discharge or otherwise discipline employees for violating that prohibition.

(b) Discharging Jimmy Sprout, suspending David Wells or otherwise interfering with, restraining, or coercing Sprout, Wells or any other employee for engaging in misconduct while striking, or while engaging in any other concerted activity protected by the Act, when, in fact, Sprout, Wells or other employees have not engaged in any misconduct under the Act.

(c) Engaging in surface and bad-faith bargaining with the above-named labor organization which is the certified exclusive collective-bargaining representative of employees in an appropriate bargaining unit of:

All full-time and regular part-time hourly employees employed at the Altorfer Machinery Company, Lift Truck Division's facility located at 3888 West River Drive, Davenport, Iowa; but excluding all other employees, including but not limited to sales employees, confidential employees, guards and supervisors as defined in the Act.

(d) Making changes in wages of any employees in the above-described appropriate bargaining unit without first reaching agreement with the above-named certified labor organization, as the exclusive bargaining representative of employees in that unit, or unless a legitimate impasse has been reached during negotiations with that labor organization.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the above-named labor organization, as the exclusive representative of all employees in the certified appropriate bargaining unit set forth in paragraph 1(c) above, and embody any agreement reached in a written contract. The certification shall extend one year from the date that such good-faith bargaining begins.

(b) Within 14 days from the date of this Order, offer full reinstatement to Jimmy Sprout as an engine rebuilders or, if they job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges.

(c) Make whole Jimmy Sprout and David Wells for any loss of earnings and other benefits suffered as a result of the discrimination directed against them in the manner set forth in the remedy section of this decision.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

(e) Within 14 days from the date of this Order, remove from its files any references to the discharge of Jimmy Sprout and the

suspension of David Wells, and within 3 days thereafter notify each of them in writing that this had been done and that those acts of discrimination will not be used against either of them in any way.

(f) Within 14 days after service by the Region, post at its Davenport, Iowa place of business copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 33, after being signed by its duly authorized representative, shall be posted by Altorfer Machinery Company, Lift Truck Division and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. It shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, it has gone out of business or closed the Davenport facility involved in these proceedings, Altorfer Machinery Company, Lift Truck Division shall duplicate and mail, at its own expense, a copy of the notice to all current employees and all former employees employed by it any time since January 21, 1997.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to steps that it has taken to comply.

IT IS FURTHER ORDERED that the amended consolidated complaint be, and it hereby is, dismissed insofar as it alleges violations of Section 8(a)(3) of the Act.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a trial at which all parties had an opportunity to present evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and we have been ordered to post this Notice.

The National Labor Relations Act gives all employees the following rights:

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT prohibit you from communicating with each other during company time and on company premises about Teamsters Local Union No. 371, affiliated with the International Brotherhood of Teamsters, AFL-CIO.

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT threaten to discharge or otherwise discipline you because you are caught violating the above-described unlawful prohibition.

WE WILL NOT discharge Jimmy Sprout, suspend David Wells, nor otherwise interfere with, restrain, or coerce Sprout, Wells or any other employees for engaging in purported misconduct during a strike, nor during any other concerted activity protected by the Act, when, in fact, they have not engaged in any misconduct under the Act.

WE WILL NOT engage in surface and bad-faith bargaining with the above-named union which is the bargaining agent for all employees in the following certified appropriate bargaining unit:

All full-time and regular part-time hourly employees employed at Altorfer Machinery Company, Lift Truck Division's 3888 West River Drive, Davenport, Iowa; but excluding all other employees, including but not limited to sales employees, confidential employees, guards and supervisors as defined in the National Labor Relations Act.

WE WILL NOT make changes in wages of any employees in the above-described appropriate bargaining unit without first having reached agreement to do so with the above-named union or unless a lawful bargaining impasse has been reached during negotiations with that union.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of your rights protected by the National Labor Relations Act.

WE WILL, upon request, bargain in good faith with the above-named union, as the exclusive representative of our employees in the above-described certified bargaining unit, and embody any agreement reached in a written contract. The certification year shall extend 1 year from the date that such good-faith bargaining begins.

WE WILL, within 14 days from the date of this Order, offer Jimmy Sprout full reinstatement to the job of engine rebuilders from which he was unlawfully terminated or, if that job no longer exists, to a substantially equivalent position, without prejudice to seniority or any other rights and privileges which he would have enjoyed had we not unlawfully discharged him.

WE WILL make whole Jimmy Sprout, for his unlawful discharge, and David Wells, for unlawfully suspending him, for any loss of earnings and other benefits suffered as a result of our discrimination against them, plus interest on the amounts owing.

WE WILL, within 14 days from the date of this Order, remove from our files any references to the unlawful discharge of Jimmy Sprout and to the unlawful 30-day suspension of David Wells, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that those unlawful acts will not be used against either of them in any way.

ALTORFER MACHINERY COMPANY, LIFT
TRUCK DIVISION